





**This Book  
Does Not  
CIRCULATE**

**Copy 1**



BOUND.....

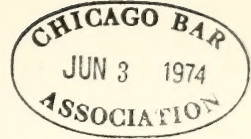
APR 10 1975



Digitized by the Internet Archive  
in 2011 with funding from

CARLI: Consortium of Academic and Research Libraries in Illinois





57751

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	
	)	Court of Cook County.
	)	
v.	)	
	)	
JOHN ALLEN,	)	Arthur L. Dunne, J.
	)	
Defendant-Appellant.	)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The defendant, John Allen, waived a jury trial and was found guilty of the offenses of unlawful possession and sale of a narcotic drug. Ill.Rev.Stat., 1969, ch. 38, par. 22-3. He was placed on probation for a period of five years, upon condition that the first six months be served in the Cook County Jail.

Allen's sole contention on appeal is that under the new Unified Code of Corrections, which applies to cases still on appeal when that statute took effect, it is improper to grant probation conditioned upon a jail term. Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-6-3(d). He therefore asks that his sentence be modified by striking the jail term.

The State agrees that the provisions of the code apply to cases not yet finally adjudicated when it became law (People v. Chupich (1973), 53 Ill.2d 572, 295 N.E.2d 1) but contends that section 1005-6-3(d) is unconstitutional as an unreasonable classification and an infringement by the legislature on the inherent powers of the judiciary. We



PATTERN

[illegible]

LIBRARY  
▼  
POST  
ACCENTS  
TO  
TITLE  
IF  
REQUIRED  
NEW TITLE  
SAMPLE  
OR RUB

WR 1



have previously answered these arguments, People v. Braddock, Ill. App.3d , N.E.2d (No. 58584 filed January 10, 1974); People v. Ortiz (1973), Ill.App.3d , 305 N.E.2d 418, and have held that while the power to impose a sentence as a punishment for crime is purely judicial, the legislature possesses the power to define the limits of the criminal sanction in light of the public interest. It is within these statutory limits that trial courts, in their discretion, determine the nature, character and extent of punishment meted out to individual offenders.

The State suggests that if the constitutionality of section 1005-6-3(d) of the code is upheld, the cause should be returned to the trial court for resentencing. In support of this suggestion it cites People ex rel. Ward v. Moran (1973), 54 Ill.2d 552, 301 N.E.2d 281. However, the Moran case held that courts of review do not have the authority to substitute a sentence of probation in place of a penitentiary sentence ordered by a trial court. In the case at bar, the defendant was admitted to probation by the trial court. The condition imposed, that he spend a portion of the term in jail, is improper under the Unified Code of Corrections and must be vacated.

As modified by the elimination of the condition that the defendant serve the first six months of his five-year probation in the Cook County Jail, the judgment of the Circuit Court is affirmed.

Judgment affirmed  
as modified.

McGlooin and Mejda, JJ., concur.





No. 58757

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
BERNARD TERPENING,	)	HONORABLE
	)	THOMAS P. CAWLEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Bernard Terpening (defendant) was found guilty at a bench trial of the offense of battery, in violation of section 12-3 of the Criminal Code, and was placed on probation for a period of one year. (Ill.Rev.Stat. 1971, ch.38, par. 12-3.) On appeal he contends that the criminal complaint filed against him was fatally defective, that the record does not demonstrate that he knowingly and voluntarily waived his right to a jury trial, and that he was not proven guilty beyond a reasonable doubt.

The complaining witness testified that on August 24, 1972, he was operating his truck on the Kennedy Expressway near Armitage Avenue in Chicago and he observed the defendant riding as a passenger in another vehicle, which was "driving crooked" and "real close" in front of his own vehicle. The witness observed the defendant throw a hammer from the other vehicle, smashing the right side window of the truck and causing a piece of glass to stick "on" the witness' arm. Both vehicles were pulled off the roadway and stopped; the defendant and the driver of the other vehicle opened the doors of the witness' vehicle, and the defendant choked and beat the witness while the other driver also beat him. The witness rolled underneath his truck for protection and the other men left the scene.



The investigating police officer testified for defendant that the report of the incident taken from the complaining witness reflected that the "occupants" of the other vehicle threw the hammer; the officer also testified that it was difficult to understand the complaining witness at the scene, who had testified at trial by means of an interpreter. The driver of the other vehicle appeared at the police station after the incident and confessed to the battery.

Defendant testified in his own behalf that he had been riding as a passenger in an automobile driven by Thomas Warchol; that the complaining witness' truck changed lanes in front of the Warchol vehicle in such manner that caused Warchol to "get hot"; that the Warchol vehicle was thereafter forced off the roadway while attempting to pass the complaining witness' vehicle; that Warchol threw a hammer through the right side window of the truck; and that as both vehicles were pulled off the roadway, Warchol stated that he was going to "get the guy." He testified that Warchol and the complaining witness commenced fighting, that he (defendant) attempted to stop the fight by keeping the men apart and holding the complaining witness around the chest, and that the complaining witness broke free and struck the defendant, causing defendant to strike back. The defendant testified that Warchol thereafter stated that they should leave the scene, that the defendant stated that they should stay, but that both he and Warchol left the scene in the Warchol vehicle because he had been a passenger in that vehicle.

The complaint filed against defendant alleged in part that he had committed the offense of battery at the named time and place upon the complaining witness, "in that he \*\*\* knowingly and intentionally, without legal justification assaulted [the



complaining witness] causeding bodily harm \*\*\*" (sic.) Defendant argues that the use of the term "assaulted" in the complaint renders it legally impossible for defendant to have committed a battery upon the complaining witness, since one committing an assault upon another cannot thereby have committed a battery.

When read in its entire context, the use of the term "assault" in the complaint was clearly intended in its common, everyday meaning and not in its literal, legal sense as urged by defendant. Defendant was otherwise properly charged with battery in the complaint, within the terms of section 12-3 of the Criminal Code, and the term "assault" was employed only to designate an advance upon the complaining witness, which culminated in the battery. (Ill.Rev.Stat. 1971, ch.38, par. 12-3; People v. Hussey, 3 Ill.App.3d 955, 957, 279 N.E.2d 732.) The case of People v. Abrams, 48 Ill.2d 446, 271 N.E.2d 37, cited by defendant, is inapposite, in that the complaints therein sought to charge an assault but alleged elements of battery.

With respect to the contention that defendant did not properly waive his right to a jury trial, the following colloquy occurred after the case had been called for trial and after the defendant had responded to preliminary questions by the court, which disclosed that he was not represented by counsel:

"THE COURT: Do you want me to appoint the Public Defender to represent you? You are a high school student. I will appoint an attorney to represent you.

"DEFENDANT TERPENING: Yes.

"THE COURT: All right, Public Defender is appointed.

"Before we go any further, will the State be ready?

"MR. LIEBERMAN (assistant State's attorney): The State is ready. We will need a Spanish interpreter.



"THE COURT: All right, I will pass the case until the Public Defender talks to you.

(Whereupon the above-entitled cause was passed and later recalled.)

"THE CLERK: Bernard Terpening. Wilson Aguilar, complainant.

"THE COURT: Are you ready for trial?

"MR. PTACEK (assistant public defender): Ready for trial.

"THE COURT: What's the plea?

"MR. PTACEK: Plea of not guilty, waive trial by jury.

"THE COURT: Jury is waived, plea of not guilty."

An almost identical situation was presented in the case of People v. Lewis, 13 Ill.App.3d 688, 301 N.E.2d 159, wherein the court held the jury waiver proper. See also People v. McClinton, 4 Ill.App.3d 253, 280 N.E.2d 795. The court in the Lewis case distinguished the cases cited by defendant herein, and they are similarly distinguishable from the instant circumstances: People v. Baker, 126 Ill.App.2d 1, 262 N.E.2d 7; People v. Boyd, 5 Ill.App.3d 980, 284 N.E.2d 699.

The final matter raised by defendant is that he was not proven guilty beyond a reasonable doubt. From the foregoing summary of the evidence, it is evident that the People adduced sufficient evidence of battery to support a finding of guilty in that regard. The inconsistencies in the evidence alluded to by defendant relate solely to the credibility of the complaining witness and must be judged in light of the fact that an interpreter had been used to translate his testimony; those matters, as well as the matter of the positioning of the vehicles when the hammer was thrown and the place from which it was thrown, were for resolution by the trier of fact.



Further, the complaining witness testified that defendant also choked him during the ensuing altercation; that act was sufficient evidence of bodily harm to have given rise to a finding of battery. The evidence adduced by the People was not so improbable or unreasonable as to leave a reasonable doubt of defendant's guilt. People v. Snarich, 3 Ill. App.3d 290, 278 N.E.2d 521.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Dempsey did not participate.



19 I.A. 51<sup>3D</sup>

73-236 CITY OF JOLIET VS.  
NICKOLUS MARCOS

STATE OF ILLINOIS



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-four, within and for the Third District  
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE JAY J. ALLOY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
April 23, 1974 the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1974

CITY OF JOLIET, A Minicipal  
Corporation,

Plaintiff-Appellant,

v.

NICHOLAS MARCOS,

Defendant-Appellee

)  
)  
)  
)  
)  
)  
)

Appeal from the Circuit Court  
of the Twelfth Judicial Circuit  
of Will County, Illinois

Honorable  
John Gnadinger,  
Judge Presiding.

Abstract

MR. JUSTICE STODER delivered the opinion of the court:

This is an appeal by the City of Joliet from a judgment of the circuit court of Will County which acquitted the Defendant, Nicholas Marcos, of the offense of assault in violation of the Joliet City Ordinance.

At a bench trial police officer Jack Loy testified that while on patrol he saw two men fighting at a gas station. One of them was later identified as the defendant. When Loy approached the combatants and stepped in between them according to his testimony, at the time I physically got between the two defendants, the Marco subject threw a right hand, apparently at myself, possibly at the subject, which was now at my rear, as I was directly in between the two." When Loy was asked whether he thought it was a punch his answer was, "Yes, sir, I thought it was a punch. If I didn't think it was a punch, I wouldn't have struck him."

At the close of the City's case (the testimony referred to above is the principle of prudence relative to the offense charged), the defendant moved for acquittal which the court allowed holding, " The person who is assaulted has to be placed subjectively in the position of being in reasonable apprehension of receiving a battery. I don't know whether Officer Loy was apprehensive, what his state of mind was. I'm going to grant the motion to dismiss that charge."

The defendant was charged with a violation of Section 21-1 of the Code of Ordinances of the City of Joliet which states:

"A person commits the offense of assault when, without lawful authority, he knowingly engages in conduct which places another in reasonable apprehension of receiving a battery."

In this appeal the City urges that the action of the trial court is erroneous and refers to the rules relating to the direction of verdicts, prima facie cases, and consequences of each, uncontradicted testimony.

At the outset it should be noted that this is a bench trial and although the proceeding is somewhat informal and irregular, the gist of the defendant's motion was that



on the basis of the City's own evidence it had failed to sustain its burden of proof. Whether the City made out a prima facie case or not or whether there was some evidence making out a triable issue of fact under the Pedrick rule is irrelevant to the court's decision. In legal effect the trial court held that Loy's own testimony concerning his conduct, the conduct of others and the circumstances in which the various parties acted, did not prove the defendant guilty of the offense of assault by a preponderance of the evidence required in such cases.

For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

Judgment affirmed.

Scott, P.J. and Alloy, J. concur



3D  
' 19 I.A. 124

59334



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.	)	
	)	
JIMMIE HILLIARD and EDWARD	)	HONORABLE
SWIFT (Impleaded),	)	LOUIS B. GARIPPO,
Defendants-Appellants.	)	JUDGE PRESIDING.

PER CURIAM:

Jimmie Hilliard and Edward Swift were charged by indictment with the crimes of murder and robbery in violation of sections 9-1 and 18-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 9-1 and 18-1). After a bench trial, Swift was found guilty of murder and robbery. He was sentenced to a term of 14 to 30 years on the murder charge. Hilliard was found guilty of robbery and sentenced to a term of 2 to 9 years.

On appeal, Swift argues that he was improperly found guilty of both murder and robbery since both arose out of the same course of conduct. Hilliard argues that his confession was improperly admitted into evidence because the State failed to produce all material witnesses to his confession. No question is raised as to the sufficiency of the evidence.

At trial the following evidence was adduced: Donald Monroe and Vanessa Washington testified that on December 13, 1971 they were in Monroe's apartment on the third floor of the building at 2026 West LeMoyne, Chicago, Illinois. At approximately 8:00 P.M. defendant Jimmie Lee Hilliard, defendant Edward Swift and Fred Houston came to the apartment. Swift told Monroe that they had just ripped off a cab driver down in the hallway. The three men split up some money.

Eileen Saxner testified that she had seen her father, Sam Sachs, on the morning of December 13, 1971 when he went to work. He was employed as a cab driver for Checker Cab Company.



She later saw him that evening in the hospital and identified his body several days later in Cook County Morgue.

Frank Bertucci, a Chicago police investigator, testified that on the early morning hours of December 21, 1971 he interviewed the defendant Edward Swift at area four headquarters. After being given his constitutional Miranda warnings, Swift stated that he, Hilliard, and Houston were approaching the building at 2026 West LeMoyne, when they heard a shot. They ran into the building and inadvertently knocked a cab driver, who was at the other side of the door, into the wall. Swift stated that as he was running up the stairs he turned and saw Hilliard and Houston going through the cab driver's pockets. They went into Monroe's apartment where they split up the money.

Investigator Bertucci also testified that later that same morning he interviewed the defendant Hilliard. After being given his constitutional Miranda warnings, Hilliard stated that on the evening in question he, Houston, and Swift were approaching the building at 2026 West LeMoyne when they observed a cab parked in front. Houston told Swift to go over and rob the cab driver. Swift entered the building and as Hilliard looked through the glass door he observed Swift striking the deceased. He also observed the deceased fall and strike his head on the concrete floor. Swift then went through the deceased's pockets. All three men went up to Monroe's apartment where they split the money.

Percy Mitchell testified that he is the building manager for the building at 2026 LeMoyne, Chicago, Illinois. On the evening of December 13, 1971 he was helping another tenant down the stairs to a waiting cab. As he entered the lobby he observed the deceased, Sam Sachs, lying on the floor of the vestibule of the building.



Michael Spino, a Chicago police officer, testified that on December 13, 1971 he responded to a call and proceeded to the building at 2026 West LeMoyne. Upon entering the building he observed Samuel Sachs lying on the floor of the vestibule in a pool of blood. Sachs had no wallet or identification on his person.

Dr. Eugene Constantinou, a pathologist for the Coroner of Cook County, testified that he performed an autopsy on the body of Sam Sachs. His autopsy revealed that the cause of death was a skull fracture and brain laceration.

Defendant Swift first argues that he was improperly convicted for both robbery and murder because both crimes arose out of the same course of conduct. The trial judge, after finding Swift guilty of both murder and robbery, was careful to note that under the law, only one sentence could be imposed. Swift was sentenced to a term of 14 to 30 years only on the charge of murder. The Illinois Supreme Court, in the recent case of People v. Lilly, \_\_\_ Ill. 2d \_\_\_, \_\_\_ N.E. 2d \_\_\_ (No. 45788, decided March 20, 1974), ruled that where both crimes arise out of the same course of conduct, a defendant may not be convicted of both crimes, even where only one sentence is imposed. Here, a review of the record demonstrates that the robbery and murder were both part of a single course of conduct. People v. Hill, 6 Ill. App. 3d 746, 286 N.E.2d 764. Under these circumstances, Swift's conviction for robbery cannot stand.

Defendant Hilliard argues that his confession was improperly introduced into evidence because the State did not produce all material witnesses to his confession at the motion to suppress. Prior to trial, defendant Hilliard filed a motion to suppress all oral and written statements on the basis of alleged mental coercion and the failure to give the proper Miranda warnings. After an extensive hearing the motion was



granted as to the written statements, but was denied as to the oral statements. The testimony adduced at the hearing demonstrated that Hilliard was arrested on December 21, 1971 at 3:45 A.M. at his apartment by Chicago police investigators Marrello, Gall, and Ritenour. Hilliard was given his constitutional Miranda warnings at that time by Investigator Marrello. Each of the arresting officers testified at the motion to suppress.

Hilliard was transported to the police station where he was interviewed with Investigator Marrello, Bertucci, Gall and Sergeant Keating present. Each of these officers testified at the motion to suppress that defendant was again given his proper constitutional Miranda warnings and thereafter made a voluntary statement. During the testimony of Investigator Bertucci, he stated that, during the questioning of Hilliard, Officer Compezio was in and out of the room on various occasions. Defendant now urges that the State's failure to call Officer Compezio on the motion to suppress was reversible error.

The burden of proving that a confession is voluntary is one which the State must assume when the admissibility of the confession is questioned. People v. Armstrong, 51 Ill. 2d 471, 282 N.E.2d 712. To meet this burden the State must produce all material witnesses connected with the confession. People v. Scott, 13 Ill. App. 3d 620, 301 N.E.2d 118. Here, Hilliard did not challenge the admissibility of his confession on the ground that it was physically coerced but based his argument upon alleged mental coercion and the failure to give the proper Miranda warnings. Every police officer who arrested Hilliard and who was present when Hilliard was given his constitutional Miranda warnings testified at the motion to suppress. All police officers who were continually in the room during Hilliard's interrogation also testified at the motion to suppress. The only person who did not testify was Officer Compezio, whose only connection with Hilliard's statement was



that he walked in and out of the room several times during the interrogation. Hilliard did not in the trial court and does not here on appeal allege that Officer Compezio was in any way directly involved in the giving to Hilliard of his constitutional Miranda warnings or in the alleged mental coercion. Under these circumstances Officer Compezio was not a material witness, and the failure of the State to call him as a witness in the motion to suppress was not prejudicial to Hilliard. People v. Jennings, 11 Ill. 2d 610, 144 N.E.2d 612.

For the foregoing reasons, the judgment of the circuit court of Cook County, finding defendant Swift guilty of robbery, is vacated; the judgments of the circuit court of Cook County, finding Swift guilty of murder and finding Hilliard guilty of robbery, are affirmed.

Affirmed in part;  
Vacated in part.

SECOND DIVISION

STAMOS, J., did not participate.

(Publish abstract only.)

10-17-19  
The  
Hickory

19 I.A.<sup>3D</sup> 135

NO. 73-183  
JAMES FABER VS. GENERAL TELEPHONE

STATE OF ILLINOIS



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-four, within and for the Third District  
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STOUDEER, Justice

HONORABLE JAY J. ALLOY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

MAY 10, 1974

the Opinion of the

Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1974.

JAMES FABER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	LaSalle County.
	)	_____
vs.	)	
	)	Honorable
GENERAL TELEPHONE COMPANY	)	Robert Malmquist
OF ILLINOIS,	)	Judge Presiding.
	)	
Defendant-Appellee.	)	

**Abstract**

---

Mr. JUSTICE ALLOY delivered the opinion of the court:

---

This is an appeal from a judgment entered by the Circuit Court of LaSalle County dismissing the amended complaint of plaintiff James Faber as being substantially insufficient in law.

The amended complaint alleges that at 10:30 A. M. on June 17, 1971, plaintiff, while in the exercise of due care for his own safety, was driving a farm tractor with a front mounted cultivator along a farm lane near Route 34 northeast of LaMoille, Illinois. Plaintiff alleges he suffered injuries which were caused when the tractor he was driving was "upset", it is alleged, after becoming entangled with a guy wire on a telephone pole which had been erected and maintained by defendant.

It is further averred that defendant had erected telephone poles along Route 34 at a time when telephone communications were carried by wires connected to these poles. Subsequently, defendant installed an underground cable to replace the function of these wires. Defendant, however, left the poles standing.



Attached to the poles were certain guy wires which ran near the side of the farm lane used by plaintiff. Plaintiff asserts that defendant was negligent in allowing the poles and guy wires to remain standing. Furthermore, plaintiff alleges that defendant created a hazardous condition by placing the poles too close to the road-way; that defendant carelessly erected old poles of decayed wood; and that the poles and guy wires had been negligently erected and maintained.

The trial court dismissed the amended complaint as substantially insufficient in law under Section 45 of the Practice Act. (Ill. Rev. Stat., 1971, ch. 110 §45). We are presented with two issues on appeal. The first issue is whether the amended complaint alleges sufficient facts to establish a causal connection between the alleged negligence of defendant and the accident which occurred. A second issue is whether plaintiff had pleaded sufficient facts to show that he was not contributorily negligent in bringing about the accident. We need deal with the first issue only.

In reviewing an order of a trial court dismissing an original or amended complaint, an appellate court will treat all allegations of fact contained in the complaint as true. (See, e.g., Sager v. City of Silvis, 402 Ill. 262, 83 N.E. 2d 683 (1949), Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E. 2d 27 (2nd Dist. 1970) ). Plaintiff first alleges that his cultivator became entangled in the guy wire because defendant had placed the pole and guy wire in a dangerous position close to the roadway. It is not alleged, however, that the guy wire extended onto the lane itself.

It is well settled that certain facts must be pleaded in order to properly charge a defendant with actionable negligence. Thus, matters must be alleged so as to raise a duty or obligation requiring the defendant to conform to a standard of conduct in order to protect others from risk of injury, and it must be alleged in factual language that such defendant has failed to conform to the required standard.



In addition, it is necessary to allege facts which, if proved, will establish a causal connection between the defendant's conduct and the injury sustained, and actual damage must result. Finally, the injured party must show that he has not conducted himself in a manner which may be categorized as contributory negligence in bringing about the injury. See generally 28 I. L. P. Negligence, §§184 et seq.

In our judgment, the instant amended complaint fails to allege sufficient facts so as to establish, if proven, that negligent conduct on the part of the defendant was the proximate cause of the occurrence by which plaintiff was injured. In that connection, even though the amended complaint admits that defendant's guy wire was not on the lane itself, one searches the amended complaint in vain for averments of fact concerning the manner in which plaintiff's cultivator came into contact with defendant's guy wire. It has heretofore been held that the placement of a utility pole in close proximity to the curb line of a street cannot, as a matter of law, be a proximate cause of a plaintiff's injury sustained as a result of driving his vehicle into the pole in order to avoid a collision with another vehicle which suddenly turned into plaintiff's path. (Crawford v. Central Illinois Public Service Co., 235 Ill. App. 339 (4th Dist. 1925). The same ruling must be followed here where there are no allegations of fact setting forth any reasons for an off-street or off-road collision with a guy wire. Under the circumstances here present, plaintiff has simply failed to proximately connect any negligence of defendant with the occurrence in question.

By reaching the foregoing conclusion with respect to the plaintiff's amended complaint, we do not mean to intimate that a plaintiff could not in any event have properly stated a cause of action against a defendant arising out of an incident in which a farm machine could become upset by a guy wire. The trial court, however, afforded plaintiff two full opportunities to prepare and file a complaint which would



withstand a motion to dismiss. Plaintiff apparently was insistent on the adequacy of the complaint and made no motion for further leave to amend the complaint.

As we have noted, plaintiff has failed to state a cause of action in the amended complaint, and under such circumstances, we cannot say that the trial court abused its discretion in entering the order from which this appeal has been taken.

In accordance with what we have herein said, the judgment of the Circuit Court of LaSalle County is hereby affirmed.

Judgment Affirmed.

Scott, P. J. and Stouder, J. concur.



19 I.A.<sup>3D</sup> 172



No. 59080

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	
	)	COURT OF COOK COUNTY.
vs.	)	
	)	HON. ARTHUR DUNNE,
JOSE MANGUAL,	)	PRESIDING.
	)	
Defendant-Appellant.	)	

PER CURIAM:

Jose Mangual, defendant, was originally charged by indictment with the crime of murder in violation of section 9-1 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38,par.9-1.) On November 13, 1972, defendant entered a plea of guilty to the reduced charge of voluntary manslaughter and was sentenced to a term of one to four years. Defendant appeals, arguing only that the trial judge failed to comply with Supreme Court Rule 402(c) (Ill.Rev.Stat. 1971, ch. 110A,par.402(c)) prior to accepting his plea of guilty.

When defendant's case was called, the assistant State's attorney moved to reduce the charge to voluntary manslaughter. The trial judge informed defendant that he was now charged with the offense of voluntary manslaughter in that, acting under a sudden and intense passion resulting from serious provocation, he did shoot and kill Alejandro L. Vargas without lawful justification. Defendant replied that he understood. Defense counsel informed the trial judge that defendant was entering a plea of guilty. The trial judge explained to defendant that by entering a plea of guilty he was waiving his right to a jury trial of twelve men or women, and his right to a bench trial, his right to have the State present evidence against him, his right to cross-examine witnesses, his right to offer evidence in his own behalf and his right not to incriminate himself. Defendant stated that he understood. The trial judge told defendant that upon a plea of guilty he could be sentenced to the penitentiary for a term of from one to twenty years. The trial judge then informed defendant that at a pre-trial conference the assistant State's attorney had informed him that upon the plea of guilty,



he would recommend a sentence of from one to five years and that the trial judge had indicated that upon a plea of guilty he would sentence defendant to a term of from one to four years. Defendant stated that he was satisfied with the representation afforded him by his attorney and was freely and voluntarily pleading guilty and accepting the sentence of one to four years.

It was stipulated that if the State's witnesses were called to testify, they would testify to sufficient facts to establish defendant's guilt beyond a reasonable doubt. The assistant State's attorney summarized the evidence: On October 31, 1971, at 1:20 a.m., the deceased took a knife and went up to the apartment of the defendant where he woke defendant up by pounding on the door and shouting obscenities. Defendant took a .45 caliber automatic gun, went into the hallway and shot the deceased six times. After the shooting, defendant fled the scene and turned himself into the Chicago Police Department four or five days later.

On appeal, defendant's only argument is that the trial judge failed to comply with Supreme Court Rule 402(c) in that the trial judge did not determine that there was a factual basis prior to accepting defendant's plea of guilty. The gist of defendant's theory is that the facts stipulated to at his plea of guilty failed to prove the crime of voluntary manslaughter and established that the defendant acted in self-defense.

Supreme Court Rule 402(c) (Ill.Rev.Stat. 1971, ch.110A, par.402(c)) requires the trial judge to determine that there is a factual basis for the plea before entering final judgment. There is no specific formula which the trial judge must use in complying with this provision and the rule requires only substantial compliance with its terms. (People v. Mendoza (1971), 48 Ill.2d 371, 270 N.E.2d 30; People v. Krassel (1973), 12 Ill. App.3d 64, 298 N.E.2d 384.) The quantum of proof necessary to determine that there is a factual basis for the plea is less than that necessary to sustain a conviction after a full trial. (People v. Arnold (February 19, 1974), --Ill.App.3d--, No. 57957.)



A plea of guilty voluntarily made precludes the necessity of proof. People v. Love (1972), 6 Ill.App.3d 577, 286 N.E.2d 355; People v. Hickman (1973), 9 Ill.App.3d 39, 291 N.E.2d 523.

In the case at bar, defendant entered a negotiated plea of guilty after a pre-trial conference while represented by privately retained counsel. Prior to his plea of guilty, defendant was admonished by the trial judge that he was entering a plea of guilty to the charge of voluntary manslaughter and was specifically informed as to the elements that constitute that crime. Defendant was fully admonished as to the consequences of his plea and stated that he understood that on his negotiated plea of guilty he would receive a sentence of one to four years. The evidence which was summarized by the assistant State's attorney demonstrated that the deceased, armed with a knife, began banging on defendant's door. Defendant took his .45 caliber gun, went out into the hallway and shot the deceased six times. Defendant thereafter fled the scene. Supreme Court Rule 402(c) does not require that the trial judge be convinced beyond a reasonable doubt that there is a factual basis for each element of the crime charged. (People v. Arnold (February 19, 1974), --Ill.App.3d--, No. 57957.) Here, the record demonstrates that the trial judge complied with Supreme Court Rule 402(c) and determined that there was a factual basis for defendant's entering a plea of guilty to the charge of voluntary manslaughter. People v. Reddick (1973), 11 Ill.App.3d 492, 297 N.E.2d 360.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. JUSTICE DEMPSEY did not participate.



3D  
19 I.A. 333

NO. 73-211  
PEOPLE VS. WILLIAM L. BAUER, JR.

STATE OF ILLINOIS



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-four, within and for the Third District  
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

MAY 10, 1974

the Opinion of the

Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



No. 73-211

---

In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Peoria County
	)	
vs.	)	
	)	Honorable
WILLIAM BAUER,	)	Richard E. Eagleton
	)	Presiding Judge.
Defendant-Appellant.	)	

**Abstract**

---

PER CURIAM

---

This is an appeal from a judgment of the Circuit Court of Peoria County finding defendant guilty of two counts of robbery and two counts of theft. Pursuant to plea negotiations defendant, with his counsel, appeared and tendered pleas of guilty to two counts of armed robbery and two counts of theft. The trial court dismissed the remaining two counts of robbery and accepted defendant's pleas of guilty. He was sentenced to concurrent terms of imprisonment of six (6) years to eighteen (18) years on each armed robbery charge and one (1) year to three (3) years on each of the theft charges. The Office of the State Appellate Defender was appointed to represent defendant in the appeal to this Court. The State Appellate Defender has now moved for leave to withdraw as counsel on appeal for appellant in accordance with the precedent in Anders v. California, 386 U.S. 738, and states that an examination of the record by counsel (accompanied by a brief in support of counsel's conclusion) has forced counsel to determine that an



appeal would be completely frivolous and could not possibly succeed.

In the record it is apparent that the indictments sufficiently charged the respective offenses and were without defects of form or substance. The trial court also substantially complied with Supreme Court Rule 402 (Ill. Rev. Stat. 1973, ch. 110A §402). The court explained the nature of the offense, the sentences prescribed by law, the right to plead not guilty, and the right to have a trial and confront witnesses. It was clear that defendant understood the admonitions and that the pleas of defendant were not induced by force, threats or promises. The court also determined a factual basis which was verified by defendant as to each of the pleas of guilty. The terms of the plea agreement were stated in open court and defendant concurred in the statement and expressed satisfaction with the plea agreement.

After acceptance of the plea, defendant waived his right to a pre-sentence investigation and, also, to his right to present evidence in mitigation and to make a statement in his own behalf. Defendant's counsel, however, presented arguments in mitigation. In accordance with the plea agreement, the court sentenced defendant to concurrent terms of imprisonment of six (6) to eighteen (18) years on each armed robbery count and one (1) to three(3) years on each theft count. The sentences all fall within statutory guidelines.

On the basis of the record in this cause, we concur in counsel's contention that there is no basis for maintaining an appeal in this cause and that the continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Peoria County, accordingly, is affirmed, and for the reasons stated, the motion of the State Appellate Defender to withdraw as counsel for defendant William Bauer is allowed.

Judgment Affirmed and  
Withdrawal Motion Allowed.



191<sup>30</sup>A. 356

(24540—4M—9-70) 160-o



## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 8th day  
of May A. D. 19 74, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

General No. 12225

Agenda 74-44

HARRIETTE MILLER,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from
	)	Circuit Court
SIMEON E. MILLER,	)	McLean County
	)	65-608
Defendant-Appellant.		

---

Mr. JUSTICE CRAVEN delivered the opinion of the court:

This is an appeal from the order of the circuit court of McLean County sentencing the defendant Simeon E. Miller to 90 days in the McLean County Jail for contempt of court. We reverse and remand for further proceedings.

The parties were divorced in 1966 and the defendant was ordered to pay certain specified sums for the support of two minor children. There was a default in the payment of some of the support money. A petition was filed for a rule to show cause why the defendant should not be held in contempt. The defendant was personally served with notice of the rule on March 14, 1973 at his home in Alton, Illinois, requiring his appearance in the McLean County circuit court on March 26, 1973. He appeared without



counsel. Plaintiff presented certain testimony with reference to the amount of arrearage and when the court asked whether the defendant had any questions, he replied:

"No sir, but I would like to say that my lawyer couldn't be here. He had some criminal cases this morning and he couldn't possibly be here, and he asked me to ask you about calling him and he would try to set up a hearing at a later date."

Following this, the defendant informed the court of the name of his attorney and essentially requested a postponement or a continuance. The court replied:

"Well, the Court won't grant any continuances. This matter is being heard now on a rule to show cause. If you wish to contact local counsel I'll recess for ten minutes and give you that opportunity, or you can testify yourself. Present your own case. The matter now is for you to show cause why you should not be held in contempt of this court. That's the purpose of the hearing. It is not such a hearing that we will continue except to grant you a time right now to call a lawyer. And that would only be for ten minutes."

\* \* \*

"You can present anything you wish to present, but if you want an attorney you're going to have to make a call immediately. We are in a hearing. We're half way through it."

The court then proceeded. The court found the defendant in willful contempt and sentenced him as indicated.

We are aware that our Practice Act and the Rules of the Supreme Court and the case law of Illinois confers broad discretion upon a trial court in the allowance or denial of continuance, but any abuse of discretion is reversible if such results in a palpable injustice. (See Reecy v. Reecy, 132 Ill.App.2d 1024, 271 N.E.2d 91.)



There is nothing in this record to indicate that the defendant attempted to delay the hearing or that there was any lack of diligence on his part in an effort to procure counsel. We are mindful of the fact that a litigant can hardly be expected to obtain counsel within the ten minutes allotted in this case and it is apparent from this record that the absence of counsel worked a substantial prejudice to the defendant. The denial of the continuance was an abuse of discretion. The judgment of the circuit court of McLean County is reversed and this cause is remanded to that court for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, P.J., and SIMKINS, J., concur.



1 19 I.A.<sup>3D</sup> 357

(24540—4M—9-70) 160-o



## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE HAROLD F. TRAPP, \_\_\_\_\_ Presiding Judge

HONORABLE JAMES C. CRAVEN, \_\_\_\_\_ Judge

HONORABLE LELAND SIMKINS, \_\_\_\_\_ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 8th day  
of May A. D. 1974, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



FILED

MAY 8 1974

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

Robert L. Conn, CLERK  
APPELLATE COURT 4TH DISTRICT

General No. 12327

Agenda 74-25

RICHARD G. JONES,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal from
	)	Circuit Court
JADE G. JONES,	)	Champaign County
	)	70-C-824
Defendant-Appellee.	)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

A decree of divorce entered in this cause in July of 1971 ordered that the plaintiff pay a specified sum as support for minor children of the parties. In October 1972, a petition for a rule to show cause and for money judgment was filed in which it was alleged that the plaintiff was delinquent in the support payments. The plaintiff filed an answer setting up extenuating circumstances and a petition to modify the decree. Ultimately, the court entered a judgment for the accumulated arrearage and granted the petition for modification. After the entry of this order, the plaintiff filed a motion to vacate the money judgment and also sought to have the original decree vacated insofar as it related to the child support payments.



Upon denial of this motion to vacate, and the denial of what is characterized as "Plaintiff's Oral Motion for Leave to File An Amended Petition to Vacate Orders Under Section 72 of the Civil Practice Act" the plaintiff perfects this appeal.

The plaintiff characterizes this appeal as a denial of a petition under section 72 of the Civil Practice Act. As we view this record, it is more appropriately characterized as an appeal from the judgment and the subsequent denial of the motion to vacate that judgment. We need not resolve the issue of which is a more appropriate characterization for the result upon this appeal is the same in any event.

In Stark v. Stark, 131 Ill.App.2d 995, 269 N.E.2d 107, this court noted that past due installments of support are a vested right and that the court was without authority to modify them retroactively. That holding, as the trial court carefully noted, is applicable to this proceeding.

The effort by the plaintiff to now assert that changed circumstances occurring subsequent to the original decree and prior to the modification bars collection of the past due installments is in contravention of that holding and cannot prevail. Illinois Revised Statutes 1969, chapter 40, paragraph 19, provides for modification of child support payments upon a showing of changed circumstances. The plaintiff did not seek such modification until such time as he responded to the rule to show cause. The trial court properly entered judgment for the past due installments and indeed was without authority to afford plaintiff the relief



that he sought. There is no suggestion in this record that there was in existence at the time of the decree facts and circumstances which if then known to the trial court would have prevented the entry of the decree within the contemplation of the decisions under section 72 of the Civil Practice Act. Accordingly, the judgment of the circuit court of Champaign County should be, and the same is, affirmed.

JUDGMENT AFFIRMED.

TRAPP, P.J., and SIMKINS, J., concur.



19 I.A. 372

73-75

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

MAY 14 1974

the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



NO. 73-75

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

MAY 14 1974

LOREN J. STROZ, Clerk  
Appellate Court, 2nd District

LOUIS J. LOMBARDI, et al,	)	
Plaintiffs-Appellants,	)	Appeal from the 18th
v.	)	Judicial Circuit,
	)	Du Page County
BOARD OF EDUCATION OF SCHOOL	)	Hon. George W. Unverzagt
DISTRICT 108, Du Page County,	)	Judge presiding
Illinois, et al,	)	
Defendants-Appellees	)	

Mr. JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

Appellants, Lombardi and Mc Dowell, conducted a write-in campaign for election to the school board of District 108. They were unsuccessful and brought this proceeding in the name of "Louis J. Lombardi, James Mc Dowell, and other unnamed residents of School District 108, Du Page County, Illinois." The complaint was signed "Louis J. Lombardi and James Mc Dowell." Lombardi and Mc Dowell are not attorneys. As early as 1841, the Supreme Court of Illinois in Robb v. Smith, 4 Ill. (3 Scam.) 46, held that a layman could not represent another in a court of record. In Leonard v. Walsh (1966), 73 Ill. App. 2d 45, 220 N.E.2d 57, the court stated, "In this case, it is clear that one not licensed to practice law has instituted legal proceedings on behalf of another in a court of record. When this appears the suit should be dismissed. . . ." While Lombardi and Mc Dowell have a right to appear pro se on behalf of themselves, they have no right to represent others.

The election in question was held in School District 108 on April 10, 1971, to fill three vacancies on the Board of



Education of that school district. The ballots in the election were delivered by the judges of election to the secretary of the Board of Education on the same date pursuant to Ill. Rev. Stat. 1969 , Ch. 122, Sec. 9-16, The Board of Education canvassed the election on April 19, (Ill. Rev. Stat. 1969, Ch. 122, Sec. 9-18.) 1971./ On May 13, 1971, the appellants filed their suit to contest the election asking that the election be declared void. However, summons were not issued until a year later on April 10, 1972. On December 29, 1972, the trial court, after hearing the Motion of the school board for summary judgment, granted the Motion. This appeal followed.

The appellants contend that some of the judges of election insisted that the addresses of the write-in candidates appear following the name of that candidate. Ill. Rev. Stat. 1969 , Ch. 122, Sec. 9-12, sets forth the form of ballot for the election of school board members. In that section is found a provision for the election of members of the Board of Education in school districts "where the membership on boards of education is restricted as to area the ballot shall specify the particular address of each candidate . . . ." In the election before us that was not the case. It appears that the members of the board were to be elected at large from the district as a whole.

The three candidates whose names appeared on the ballots in question, pursuant to the canvass were determined to have received 718, 687 and 692 votes respectively. Lombardi was found to have received 29 votes and Mc Dowell 27 votes. 110 ballots were found "defectively marked or



left blank and not counted." It can thus be seen that if all of the questioned ballots had been counted for both Lombardi and Mc Dowell, their vote would have been 139 and 137 respectively, the successful candidates each having received approximately four times that number of votes.

Pursuant to Section 9-16 of the School Code, supra, the ballots in question were destroyed by burning at the expiration of the six month statutory retention provision. The Board of Education were not notified of the election contest by the service of summons until some eleven months after the filing thereof. The preservation of the ballots is the burden of the moving party in an election contest. (Mac Wherter v. Turner (1964), 52 Ill. App. 2d 270, 201 N.E.2d 325). The Board of Education not having been notified of the pending election contest we find that the destruction of the ballots pursuant to the statute was proper. The ballots having been destroyed pursuant to statutory authority, it was of course impossible to examine the same for irregularities, if any. Had appellants followed the proper procedure for an election contest, a subsequent recount would have determined whether the votes in question were or were not properly counted. Appellants may not avoid the statutory recount procedure and seek to have the election declared "void" on the basis that the votes in question were not counted, and that the voters whose votes were not counted were "disenfranchised." Stating it otherwise, the irregularity herein, if any, is one that could have been corrected in a proper election contest.



The courts of Illinois have consistently held that to sustain an election contest, the pleadings must make a clear and positive assertion that a recount would have changed the result of the election. On the face of the pro se complaint it appears that is not the case before us. The Supreme court in Zahray v. Emricson (1962), 25 Ill. 2d 121, 123, 182 N.E.<sup>2d</sup>/756, stated the law in this regard as follows:

"Repeated decisions have firmly established that the purpose of a proceeding to contest an election is to ascertain how many votes were cast for or against a candidate, or for or against a measure, and thereby ascertain and render effective the will of the people. (Citation) Equally certain is the principle that the proceeding cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge. (Citations) And while the pleadings in contest proceedings are not required to comply with the strict technical rules applicable in civil actions, there should be such strictness as will prevent the setting aside of the acts of sworn officials without adequate and well defined cause. (Citations) Stated otherwise, there should be no reason for a recount of the votes unless there is a positive and clear assertion, allegation or claim that such a recount will change the result of the election."

We do not find that Hester v. Kamykowski (1958), 13 Ill. 2d, 481, 150 N.E.2d 196, cited by both appellant and appellee is controlling. The court there found that the officials charged with holding of the election failed to comply with the mandatory provisions of the statute and held the election to be void. That is not the factual situation in the case before us. Appellants contend that the failure of the election officials to count the disputed ballots voided the election. Had they followed the proper statutory procedure,



the trial court would have been able to determine whether the disputed 110 ballots were or were not properly counted. The judgment of the trial court in granting summary judgment is affirmed.

AFFIRMED.

P.J. MORAN and J. SEIDENFELD Concur.



IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

191.A.425

**FILED**  
APR 30 1974  
*Walter T. Zimmerman*  
CLERK APPELLATE COURT  
FIFTH DISTRICT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	{	Appeal from the Circuit Court of
Plaintiff-Appellee,		Randolph County
v.		
ROBERT J. BAKER,	{	
Defendant-Appellant		Honorable Carl H. Becker
Pro Se.		Judge Presiding

Mr. JUSTICE CARTER delivered the opinion of the court:

On January 3, 1969, an indictment was filed in the Circuit Court of Randolph County charging the defendant, Robert J. Baker, with the alleged offenses of escape, kidnapping, theft in excess of one hundred fifty dollars (\$150)(two counts), burglary, and armed robbery.

On February 20, 1969, defendant appeared in open court and entered a plea of guilty to all charges. He was sentenced to a term of nine to ten years for escape, ten to fifteen years for burglary, ten to fifteen years for armed robbery, and one to five years for each of the remaining counts. All sentences were to run concurrently and were to commence after the termination of a 99 year sentence which the defendant was serving at the time of his escape.

On December 16, 1970, defendant filed a motion to vacate judgment under Ill.Rev.Stat., ch.110, sec.72. This motion was not heard. On January 10, 1973, defendant filed an amended motion to vacate judgment. On April 6, 1973, the Circuit Court denied this motion. Defendant-appellant appeals from this denial.

Two issues are presented: Was appellant's petition proper under Section 72, thus bringing the matters alleged in the petition before this court, and was the entry of judgment and imposition of sentences on all counts of the indictment by the trial court proper?

In People v. Touhy, 397 Ill. 19, 72 N.E.2d 827 (1947), the court stated that the purpose of Section 72 is to enable the petitioner to bring before the court rendering judgment matters of fact not appearing of record,



which, if known at the time judgment was rendered, would have prevented its rendition. It appears that facts relevant to the case were known to the court at the time judgment was rendered. Error asserted by the appellant involved points of law--acceptance of the plea, improper judgment, improper sentence.

When Touhy was decided in 1947, the pertinent part of Section 72 read as follows:

"The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by writ, may be corrected by the court in which the error was committed, upon motion in writing."

But in 1955 this portion of Section 72 was amended to read as follows:

"Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief theretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable."

Hence, when a question regarding the scope of Section 72 was presented to the court in People v. Greene, 92 Ill.App.2d 201, a case decided after Section 72 had been amended, the court held that, though a petition under Section 72 is not the only remedy available for attacking errors of law appearing on the face of the record, it is nevertheless an appropriate remedy. The holding in this case was cited with approval in People v. Stewart, 3 Ill.App.3d 696, a case arising in the Fifth Appellate District. We agree with this statement and consider appellant's petition properly before this court.

The primary question in this case has to do with the number of offenses with which the appellant should have been charged and with the sentences imposed. In People v. Siglar, 5th District, Agenda No. 73-14, a case involving a co-defendant of the appellant, identical counts were involved. In that case we discussed the implications of Ill. Rev. Stat., ch. 38, sec. 1005-8-4(a) and concluded that three charges were proper--escape, burglary, and armed robbery. We also held in that case that, since the defendant had knowingly and voluntarily pleaded guilty to the six offenses charged, we would not disturb the charges but would modify the sentences.



In Simpler the defendant waited two years for filing a notice of appeal within the time specified in Supreme Court Rule 606. In the present case the issue was raised by a petition under Section 72 filed approximately 22 months after defendant was sentenced. The petition was filed more than two years before the Unified Code of Corrections became effective. However, no hearing was held on the defendant's petition until April 6, 1973. In the interim defendant filed an amended petition on January 10, 1973. Section 1008-2-4 of the Unified Code of Corrections states in part:

"If the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced."

Interpreting the meaning of "final adjudication," the Supreme Court of Illinois in People v. Smith, 53 Ill.2d 372, stated:

"We are of the opinion that 'sentencing stage' and 'final adjudication' do not mean the same thing and that the Appellate Courts have correctly held that the penalties provided in the Controlled Substances Act are applicable to cases pending upon direct appeal. The same result will follow under the Unified Code of Corrections."

Thus the court held in effect that until the time for filing a direct appeal had run out, the Unified Code of Corrections was applicable. Thus in the present case, since the defendant did not file an appeal, it could be concluded that the Unified Code of Corrections is inapplicable. This can be further substantiated by the argument that if every person serving a sentence, regardless of when imposed, could invoke the provisions of the Unified Code of Corrections by filing a Section 72 petition, a veritable Pandora's box would be opened. We do not believe this was the intent in providing relief under Section 72 and in providing when the Unified Code is applicable as stated in Section 1008-2-4.

But this case is unique in that a Section 72 petition was filed within the time specified but was not heard until more than two years later--after the effective date of the Unified Code of Corrections and after the defendant had amended his petition subsequent to that date. At this time there would be few defendants who could present a similar set of circumstances. We do not feel that to apply the Unified Code of Corrections under these particular circumstances could possibly set an unmanageable precedent. While we are reluctant to disturb the trial court's decision regarding sentences, the record does fail to show that the trial court also ascertained factors favoring the defendant in his petition or that it properly balanced the interests of the State in imposing what appear to be unduly severe sentences.



Accordingly, we hold in this case, following the reasoning in People v. Siglar, 5th District, Becker No. 73-14, as stated above, that since the defendant had knowingly and voluntarily pleaded guilty to the six offenses charged, we would not disturb the conviction but will modify the sentence. Therefore, the sentences for first (two counts) and for kidnapping are vacated. Under circumstances not uniquely identical to those here present, we do not consider our holding here as of any precedential value.

The judgment of conviction of the Circuit Court of Randolph County is affirmed and the case is remanded to the Circuit Court for sentencing hearing on the charges of escape, burglary and armed robbery.

Affirmed and remanded with directions.

EBERSPACHER, J., AND CREBS, J., CONCUR.

PUBLISH ABSTRACT ONLY



No. 73-265

FILED  
JAN - 1974

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

FILED  
JAN - 1974  
FIFTH DISTRICT OF ILLINOIS  
APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the First Judicial Circuit Court
Plaintiff-Appellee,	)	of Jackson County
vs.	)	
	)	
LARRY JOE LIPE and STEVEN RAY	)	
MILLER,	)	Honorable Everett Prosser,
	)	Judge Presiding.
Defendants-Appellants.)	)	

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

The defendants pled guilty to burglary and aggravated battery. The pleas were entered subsequent to plea negotiations and the court imposed concurrent sentences of three to four years on each charge.

The defendants did not appeal the judgments, but filed a petition pro se seeking post conviction relief under Illinois Revised Statutes, ch. 38, par. 122-1, et seq.

The defendants' petition, while claiming "substantial constitutional violations" that occurred at the hearing wherein the court accepted their pleas, only alleged procedural noncompliance with Supreme Court Rule 402. The defendants, in effect, stated that the court did not strictly comply with the aforesaid rule on admonishment of a defendant before a plea in order to determine the voluntariness of that plea. But the defendants herein did not allege that their pleas were, in fact, involuntary, the result of coercion or that they were made without a full knowledge and appreciation of the consequences thereof.

It must be kept in mind, however, that defendants prepared these admittedly defective pleadings without the assistance of counsel.

The State moved to dismiss on the grounds that defendants' petition failed to state a denial of constitutional rights, but instead set forth "mere procedural error." The State's attorney further argued that the record of the proceedings had on the plea indicated that defendants had indeed understood what they were doing and the consequences of a guilty plea.



The public defender was appointed by the court to represent the defendants for their post-conviction relief, but he moved to vacate that appointment on the ground of a possible conflict of interest, citing, inter alia, People v. Smith, 37 Ill.2d 622. The public defender had represented the defendants during plea negotiations and during the actual session wherein the pleas were entered. He argued that he should not be put into a position of reviewing his own possible errors raised by a post-conviction petition and hearing.

The court denied the motion to vacate the order appointing the public defender to represent the defendants. The court stated that the petition of the defendants did not allege "any conflict or disapproval of the services the defendants received \* \* \* by the public defender's office." The court held a hearing on defendants' petition but the public defender did not make any response to the People's motion to dismiss nor to the state's attorney's arguments in favor of said motion. The public defender during the hearing defended his counsel as rendered to the defendants during the plea negotiations and he furthermore stated that "there is no substantial question of constitutional law involved" with the defendants' petitions. The trial court thereupon dismissed the petition for post-conviction relief and the defendants appealed.

The hearing on the defendants' petition was not an adversary proceeding on the merits. The record is bare of any compliance with Supreme Court Rule 651(c) which requires consultation between defendants and their appointed counsel so as to indicate a proper representation for said defendants. This lack of consultation between the public defender and the defendants is enough in itself to raise a question of the sufficiency of legal representation afforded to the defendants herein. People v. Garrison, 43 Ill.2d 121, 251 N.E.2d 200.

The record discloses that the public defender did not in fact make any attempt to consult with the defendants in any way and, moreover, did not offer any substantive response to or arguments against the people's motion to dismiss defendants' petition. Whatever the merits of defendants' petition, we cannot be expected to review them for the first time on appeal. The trial court has an obligation to fully hear the merits of this cause in an adversary proceeding.



The trial court's order denying post-conviction relief is therefore reversible because the hearing reflects a palpable lack of representation for the defendants which vitiated a fair hearing on the merits of their petition.

The state's attorney cannot be heard to complain of any material defects in the post-conviction petition by the defendants if these defendants were not given assistance of counsel in the preparation of their case.

It is, furthermore, clear that the public defender had proper grounds for requesting that he not be appointed attorney for the defendants herein. (People v. Terry, 46 Ill.2d 75, 262 N.E.2d 923; People v. Smith, 42 Ill.2d 547, 248 N.E.2d 85.) Hence, the order of the court denying his motion to vacate its order of appointment was also error.

This case is therefore reversed and remanded to the trial court for further proceedings consistent with this opinion.

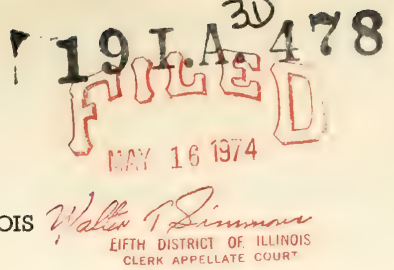
Reversed and remanded.

CONCUR:

CARTER, EBERSPACHER, JJ.

PUBLISH ABSTRACT ONLY.






---

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Plaintiff-Appellee, )  
 )  
 vs. )  
 )  
 OTIS NELSON, )  
 )  
 Defendant-Appellant. )

Appeal from the Circuit Court of the  
 Twentieth Judicial Circuit,  
 St. Clair County.

Honorable James W. Gray,  
 Judge Presiding.

---

## PER CURIAM:

Defendant appeals from a judgment of the circuit court of St. Clair County finding him guilty of the crime of armed robbery after his plea of guilty.

He contends the trial court erred in failing to comply with Supreme Court Rule 402(a)(1), prior to accepting his plea of guilty.

Rule 402 provides in part:

"In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge; \* \* \* "

The record of the hearing on defendant's plea of guilty discloses that at no time during the hearing on defendant's plea of guilty did the trial court ever address the defendant personally in open court to determine that the defendant understood the nature of the charge.

In People v. Hudson, 7 Ill.App.3d 800, 288 N.E.2d 533, this court listed the criteria necessary for a proper admonishment regarding the nature of the charge:

" \* \* \* The crux of the requirement of Rule 402(a)(1) is understanding. The nature of the charge consists of two parts: (1) The acts and intent (if any) required to constitute a violation of the provisions of the criminal code, and (2) the alleged acts and intent (if any) with which the alleged acts were committed which are attributed to the defendant in the particular case. These two parts should be explained by the judge to the defendant in open court in laymen's terms. The judge should proceed no further until he is completely satisfied from the defendant's personal remarks in open court that he understands the explanation." 7 Ill.App.3d at 802.



In the instant case, the trial court did not explain either the acts required to constitute the crime of armed robbery or the alleged acts which were attributed to the defendant.

The defendant contends that there were other errors in the proceedings when his guilty plea was accepted by the court. However, it is not necessary to discuss these points, as non-compliance with Supreme Court Rule 402(a)(1) compels reversal of this case. Accordingly, the judgment of the trial court of St. Clair County is reversed and this cause is remanded with directions to allow the defendant to plead anew.

Reversed and remanded with directions

Crebs, J., not participating.

PUBLISH ABSTRACT ONLY.



No. 73-118

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

FILED  
MAY 17 1974

*Walter T. Sullivan*  
FIFTH DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	:	Appeal from the Circuit Court of the
Plaintiff-Appellee,	:	First Judicial Circuit, Williamson
	:	County, Illinois.
vs.	:	
RICHARD L. DOVIN,	:	Honorable John H. Clayton,
Defendant-Appellant.	:	Judge Presiding.

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

This is an appeal from a judgment entered by the circuit court of Williamson County against the defendant, Richard Dovin, for the offense of driving a vehicle while under the influence of intoxicating liquor and the imposition of a one hundred dollar fine and a sentence of seven days in the county jail and the revocation of defendant's driver's license.

The sole issue raised on this appeal is whether the defendant waived his right to a jury trial. The only evidence of waiver is a docket entry. No written waiver of trial by jury appears in the record and none is noted on the docket. The defendant had a right to a jury trial and that right will not be presumed waived from a silent record. (Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709.) See also People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708; People v. Talley, 130 Ill. App.2d 957, 267 N.E.2d 13; People v. Rosen, 128 Ill.App.2d 82, 261 N.E.2d 488.

We, therefore, reverse the judgment entered by the circuit court of Williamson County against the defendant and remand this cause with directions that the defendant be granted a new trial with a jury.

Reversed and Remanded with directions.

CARTER and CREBS, J.J. concur



72-259

UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       )    ss.  
Second District       )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L. L. RECHENMACHER, Justice  
                 LOREN J. STROTZ   , Clerk  
                 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit:    On  
May 24, 1974                   the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

MAY 24 1974

PEOPLE OF THE STATE OF ILLINOIS, )	)	
	)	
Plaintiff-Appellee, )	)	
	)	
v. )	)	Appeal from the Circuit Court
	)	for the 16th Judicial Circuit,
JOHN L. GLOVER, )	)	Kane County, Illinois.
	)	
Defendant-Appellant. )	)	

LOREN L. S. ...  
Appellate Court, and ...

MR. JUSTICE RECHENMACHER delivered the opinion of the court.

Defendant appeals from a judgment of the circuit court of Kane County denying his petition for post conviction relief. On June 1, 1970 defendant was indicted for attempted murder (Count I), aggravated battery in violation of Section 12-4 (a) of the Criminal Code (Count II), and aggravated battery in violation of Section 12-4 (b) (1) (Count III). Defendant, represented by private counsel, pleaded guilty to Count II of the indictment pursuant to a negotiated plea. After a hearing on defendant's application for probation and on aggravation and mitigation, defendant was sentenced on August 28 to a term of 5-10 years. No appeal was taken from that judgment. More than five months later defendant filed a pro se petition for post conviction relief which was prepared for him by another prison inmate. The trial court appointed counsel for defendant, who, after examining the court file and interviewing the defendant at the penitentiary and corresponding with him, prepared and filed an amended petition for post conviction relief. After hearing on that petition the trial court, on January 24, 1972, denied defendant's petition.

Defendant here seeks reversal of the trial court judgment because of the failure of his appointed post conviction counsel to comply



with Supreme Court Rule 651 (c) (Ill. Rev. Stat. 1969, ch. 110A, par. 651 (c) ) and points to the absence in the record of a certificate by defendant's counsel that he consulted with defendant, examined the record of proceedings at the trial and made any necessary amendments. Defendant misapprehends the rule. It does not require such certificate by defendant's counsel if the record on appeal shows that these steps were taken. People v. Roebuck (1972), 7 Ill. App. 3d 7, 9, 286 N.E. 2d 149; People v. Gaston (1973), 9 Ill. App. 3d 623, 292 N.E. 2d 478.

He further contends that if his post conviction counsel had read the transcript of the hearing on aggravation and mitigation, he would have been able to argue that defendant's sawed-off shot gun was fired accidentally which would negate the existence of the mental state required for aggravated battery, and that such "negation" would have required the court sua sponte to vacate the guilty plea. We have carefully examined the record and the transcript of the proceedings and we are unable to find support for that argument. At the hearing in aggravation and mitigation defendant's counsel acknowledged that defendant had the gun and made threats to the victim. The record shows that the gun was loaded by the defendant prior to the incident and if it went off accidentally, that it was done after it must have been cocked by defendant. Moreover, the trial court at that hearing gave defendant an opportunity to withdraw his guilty plea. Defendant's counsel declined the offer. The record shows that defendant's post conviction counsel substantially complied with Supreme Court Rule 651 (c) and his failure to examine the transcript resulted in no prejudice to defendant.

Defendant argues to this court that when he entered his guilty plea on August 17, 1970 the trial court failed to find that defendant understood the nature of the charge and the consequences thereof if found guilty, as required by Supreme Court Rule 401 (b)



(Ill. Rev. Stat. 1969, ch. 110A, par. 401(b).) Defendant acknowledges that this argument was not presented in the trial court. Since this contention was available to the defendant and he failed to advance it in his petition, his failure to do so constitutes a waiver. (People v. French (1970), 46 Ill. 2d 104, 107, 262 N.E.2d 901, (cert. den. 400 U.S. 1024, 27 L.Ed.2d 636); People v. Burton (1970), 46 Ill. 2d 135, 141-142, 262 N.E.2d 917; People v. Barber (1972), 51 Ill. 2d 268, 269, 281 N.E.2d 676.) In any event, from our examination of the entire record it is apparent that defendant's guilty plea was made knowingly, understandingly and voluntarily, and that there was substantial compliance with Rule 401(b).

Finally, he contends that the trial court erred in denying post conviction relief after learning that defendant was a "functional illiterate" at the time of the guilty plea. At the hearing on his post conviction petition defendant's counsel presented to the court a letter from the Assistant Superintendent of Education at the Adult Education Center at Joliet stating that when defendant entered the institution he "tested out as a functional illiterate" signifying "a grade level of between first and second grade" and that he is now on a 5-6 grade level with signs of improvement. Defendant contends that when this information was presented the trial court should have allowed him to withdraw his guilty plea and to plead anew. Mere illiteracy does not make a person incapable of understanding admonitions of the court in connection with a guilty plea. The defendant had the burden of proof at the post conviction hearing that he was so illiterate when he entered his guilty plea that he lacked competence to do so. (People v. Allison (1972), 8 Ill. App. 3d 161, 289 N.E.2d 195.) He did not meet that burden. The record affirmatively shows that



defendant had the capacity of understanding what was going on around him and thus his guilty plea was made knowingly, understandingly and voluntarily. The judgment of the circuit court of Kane County is therefore affirmed.

Judgment affirmed.

Thomas J. Moran, P.J., and Guild, J., concur.



72-246

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
May 24, 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



NO. 72-246

---

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

**FILED**  
MAY 24 1971  
LOREN J. STROTZ, Clerk pro tem  
Appellate Court, 2nd District

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	Appeal from the 18th
	)	Judicial Circuit,
v.	)	Du Page County
	)	
JEFFREY OLIVER,	)	Hon. L. L. Rechenmacher,
	)	Judge presiding
Defendant.	)	

---

Mr. JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

This appeal has emanated from a judgment of the circuit court of Du Page County finding defendant guilty of three offenses of theft of property not exceeding \$150 in value in violation of Ill. Rev. Stat. 1969, Ch. 38, Sec. 16-1 (a) (1), pursuant to a negotiated plea. The trial judge sentenced defendant to serve one year in the State Penal Farm at Vandalia, Illinois. The office of the District Defender of the Illinois Defender Project, Second Judicial District, was appointed to represent defendant in this appeal. The appointed appellate counsel has now moved for leave to withdraw as attorney of record for defendant on appeal in accordance with the criteria enunciated in Anders v. California (1967), 386 U.S.738, 87 S.Ct. 1396, 18 L.Ed 2d 493, and upon the specific assertion that his examination of the record requires a conclusion that the appeal would be completely frivolous and without merit.

Defendant was initially charged on February 11, 1971 in a three count indictment with three separate offenses of theft of property in excess of \$150 in value, in violation of Ill. Rev. Stat. 1969, Ch. 38, Sec. 16-1 (a) (1). The indictment properly apprised defendant of the charges and gave the circuit court



jurisdiction of the matter. Defendant had originally plead not guilty to the charges contained in the indictment.

Pursuant to subsequent plea negotiations, however, on April 4th, 1972 defendant appeared with his court appointed counsel and moved to withdraw his previous plea of not guilty. Upon the trial court's granting of this motion, defendant entered a plea of guilty to the lesser offenses of theft of property not in excess of \$150 in value. The circuit court judge accepted this plea and sentenced defendant. Pursuant to defendant's request, execution of the sentence was stayed for 23 days so that defendant could finish serving a sentence in the Cook County House of Corrections on another charge independent from the charges involved in this appeal.

In accepting the plea, the trial judge fully and carefully complied with the requirements of Supreme Court Rule 402 (Ill. Rev. Stat. 1971, Ch. 110 A, par. 402.) Although the indictment was phrased in simple language, defendant waived the formal reading of the indictment. The trial judge read and explained to defendant, in plain and simple language, each of the three counts contained in the indictment. Upon completion of this reading and explanation, the trial judge asked defendant if he understood the nature of the charges against him and defendant replied that he did.

The trial judge also explained to defendant in clear simple language, the possible minimum and maximum sentences involved. The trial judge determined that defendant voluntarily withdrew his plea of not guilty, and confirmed with defendant that there was no force, threats or promises of leniency involved in the plea agreement. The judge advised defendant that he had a right to a trial by either the court or jury; but by pleading guilty to the charges, defendant would be waiving this right along with defendant's right to confront any witnesses who would



testify against him. The defendant responded that he understood these consequences of his plea of guilty. The trial judge finally admonished defendant that by pleading guilty he would be waiving the presumption of his innocence that is always present in criminal cases. The trial judge also admonished defendant that by pleading guilty the State would not be required to put on any proof of the offenses charged against defendant. The plea agreement was stated in open court and defendant confirmed that the agreement was accurately stated. The court finally determined that the factual basis for the plea was sufficient to support the conviction.

On the basis of the record, it is apparent that a court of review would not find reason to disturb the sentence for which defendant bargained (People v. White (1972), 5 Ill. App.3d 205, 282 N.E.2d 467.) It is also apparent that defendant's sentence was not excessive when rendered, and cannot now be considered excessive under Sec. 16-1 (e) (1) of the Unified Code of Corrections (Ill. Rev. Stat. 1973, Ch. 38, par. 16-1 (e) (1).)

On the record, we concur in counsel's contention that there is no basis for maintaining an appeal in this cause and that the continuation of the appeal would be wholly frivolous and without merit. The judgment of the Circuit Court of Du Page County is accordingly affirmed; and, for the reasons stated, the motion of the District Defender of the Illinois Defender Project to withdraw as counsel for the defendant, Jeffrey Oliver, is allowed.

JUDGMENT AFFIRMED and Withdrawal Motion allowed.

Thomas J. Moran, P.J., and Seidenfeld, J., concur.



19 I.A.<sup>3D</sup> 576

73-386

UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )     ss.  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L.L. RECHENMACHER, Justice  
                  LOREN J. STROTZ , Clerk  
                  JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

MAY 29 1974

the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures  
following, viz:



FILED

MAY 29 1974

No. 73-386

LOREN J. STROTZ, Clerk pro tem  
Appellate Court, 2nd District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

Abstract

---

BUDGET RENT-A-CAR,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Nineteenth
v.	)	Judicial Circuit, Lake
	)	County, Illinois.
RUTH C. KIRK,	)	
	)	
Defendant-Appellant.	)	

---

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Plaintiff filed a small claims action to recover alleged "damages to leased vehicle and rental charges". A default judgment entered in the amount of \$524.10 was vacated and the case set for trial. In a hearing before the court, judgment was entered against defendant in the amount of \$194.10. Defendant has appealed contending that plaintiff failed to prove legal existence or performance of the contract and that the court erred in defining the \$100 deductible provision in the lease to include replacement of a defective engine.

The record of the unreported hearing is presented by a Report of Proceedings certified by the court under Supreme Court Rule 323(c). Ill.Rev.Stat. 1971, ch. 110A, par. 323(c).

The appellee has not filed an answering brief.

When an appeal has been perfected but the appellee does not submit an answering brief, the reviewing court may reverse the judgment without further explanation of the merits of the



appeal. (Metro Investments Co. v. Enge (1973), 12 Ill.App.3d 77, 78; People v. Spinelli (1967), 83 Ill.App.2d 391, 392; Loucks v. Loucks (1971), 130 Ill.App.2d 961, 963; Rotter v. Rotter (Abst. 1970), 119 Ill.App.2d 231.) We may, however, in our discretion examine the record and may rule on the merits to prevent injustice. (See Loucks v. Loucks, 130 Ill.App.2d 961, 964; Lynch v. Wolverine Ins. Co. (1970), 126 Ill.App.2d 192, 193-4.) Here, we conclude that the cause should be summarily reversed and remanded for a new trial.

Reversed and remanded.

GUILD, J. and RECHENMACHER, J. concur.



12321

19 I.A. 589  
(24540-4M-9.70) 160-0

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP	Presiding Judge
HONORABLE LELAND SIMKINS	Judge
HONORABLE PEYTON H. KUNCE	Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 27th day  
of May A. D. 1974, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



## Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

General No. 12321

Agenda No. 74-61

Henry Geving and Andrea Geving,	)	
	)	
Plaintiffs-Appellants	)	
	)	
v.	)	Appeal from
	)	Circuit Court
	)	Sangamon County
J. R. Fitzpatrick,	)	60-72
	)	
Defendant-Appellee	)	

---

Mr. JUSTICE SIMKINS delivered the opinion of the court:

The plaintiffs here appeal from the dismissal of seven counts of their eight-count amended complaint and from an order denying leave to amend those dismissed counts.

The basic underlying facts of the case as derived from the written agreement entered into between the parties, plaintiffs' complaint, and the parties' briefs are as follows: The plaintiffs, husband and wife, resided in Cedar Falls, Iowa, where they were employed as sculptors when they were approached by the defendant who proposed to open a wax museum in Springfield, Illinois, having to do with the Lincoln Heritage. Negotiations between plaintiffs and the defendant resulted in an agreement entitled "ABRAHAM LINCOLN WAX MUSEUM, INC. SUBSCRIPTION AGREEMENT" signed on May 21, 1971.

The agreement stated that:

"J. R. Fitzpatrick, Springfield, Illinois, and  
Henry G. Geving and Andrea C. Geving, Cedar Falls,



Iowa, desire to form an Illinois corporation to be called Abraham Lincoln Wax Museum, Inc. to engage in the business of operating a commercial wax museum devoted to the theme of the Lincoln Heritage and a gift shop at Springfield, Illinois. In consideration of their mutual promises the parties hereto agree to purchase in the manner hereafter specified the issued shares of Abraham Lincoln Wax Museum, Inc., that is J. R. Fitzpatrick will purchase one-half of such shares and Henry G. Geving and Andrea C. Geving will purchase one-half of such shares."

The Agreement further provided in four lettered paragraphs that in payment of his shares the defendant would procure a lease to designated premises in Springfield at a certain maximum rental to be used for the wax museum and gift shop. The defendant was to complete the remodeling of the premises by August 1, 1971 so that they were suitable for such business, and defendant was to loan plaintiffs \$10,008.50 to be used for plaintiffs' living expenses and supplies prior to the incorporation of the business and to cancel that indebtedness upon the incorporation and the full performance of the plaintiffs' duties set forth in the contract. Then followed three paragraphs stating that plaintiffs, in payment for their shares, would prepare and deliver by August 1, 1971 to the Abraham Lincoln Wax Museum, Inc. a minimum of 18 wax figures suitable for its purpose, deliver to the defendant for the sums loaned to them a note of indebtedness along with a security interest or chattel mortgage on the wax figures to be created, and accept employment as operators of the wax museum on August 1, 1971 at specified salaries. Plaintiffs executed a promissory note for the sum of \$10,008.50 simultaneously with the



foregoing agreement naming defendant as payee. The note contained a condition that it should be cancelled and returned to plaintiffs upon the formation of Abraham Lincoln Wax Museum, Inc., and that the note should be payable on demand only in the event that the makers did not fulfill their obligation under the term of the agreement. The promissory note was secured by a security interest on the wax figures which plaintiffs were to prepare for the wax museum.

Plaintiffs allege that acting in reliance on the agreement they moved to Springfield, giving up any other source of income, and began preparing the wax figures using the money advanced by the defendant for the intended purpose of financing their work and paying living expenses. Plaintiffs allege that they delivered the wax figures to the defendant for the operation of the museum and gift shop, but when Abraham Lincoln Wax Museum, Inc. never came into existence, the plaintiffs defaulted on the promissory note and thereafter defendant foreclosed the security interest, took possession of the wax figures, and sold them to cover the indebtedness. Concluding that the defendant was not going to perform what plaintiffs construed as an agreement to incorporate, plaintiffs filed a complaint consisting of six counts on January 31, 1972. On October 6, 1972 defendant's motion to dismiss the complaint was allowed. On October 26, 1972 the plaintiffs filed an amended complaint containing eight counts. Count I alleged that plaintiffs had performed their duties under the contract but that defendant failed to perform the obligations imposed on him.



Count II alleged an oral agreement to incorporate; Count III alleged a cause of action of quantum meruit for plaintiffs' work in creating the wax figures, remodeling the premises, and operating the wax museum; Counts IV and V sought an accounting by defendant; Counts VI and VII alleged claims of fraud on the part of the defendant by inducing plaintiffs to move to Springfield, create the wax figures, and incur debts to defendant secured by the wax figures; Count VIII alleged a cause of action for conversion of personal property involving merchandise for the gift shop connected with the wax museum.

Defendant's motion to dismiss the amended complaint was allowed as to all counts except Count III for quantum meruit. The record on appeal does not contain the written opinions of the trial court, but the plaintiffs' motion for leave to amend states that the court struck the seven counts on the grounds that each did not allege facts sufficient to state a cause of action. Plaintiffs' motion for leave to amend simply alleged that plaintiffs believed there were sufficient facts to adequately set forth a cause of action under the counts and that the interests of justice required that plaintiffs be given an opportunity to set forth their causes of action against defendant. Thereafter, the court denied the motion for leave to amend and entered an order finding that there was no just reason for delaying the enforcement of appeal with reference to the court's dismissal of Counts I, II, IV, V, VI, VII, and VIII of the amended complaint. Plaintiffs then instituted this appeal from the order dismissing seven of the eight counts of



their amended complaint and from the order denying their motion for leave to amend those counts.

On appeal, plaintiffs' brief only argued the alleged error in dismissing Count I of the amended complaint which was based on the defendant's alleged breach of the contract entered into by the parties in May 1971. The amended Count I alleged that plaintiffs had performed all the things required of them by the contract entered into by the parties and which was attached to the complaint, but that defendant had failed and refused to perform the obligations imposed on him by the contract in that he did not lease and remodel the specified premises; refused to join with plaintiffs to organize the corporation, issue shares, and purchase one-half of the shares; failed and refused to cancel plaintiffs' indebtedness incurred pursuant to the contract by making it impossible to incorporate Abraham Lincoln Wax Museum, Inc., and failing to cancel the indebtedness after plaintiffs' full performance of their obligations. Finally it was alleged that defendant refused to pay plaintiffs the salary required under the contract with the count concluding that plaintiffs suffered damages of \$50,000 by defendant's breach of contract and asking for judgment in that amount.

With regard to Count I, defendant's motion to dismiss alleged that the contract was a subscription agreement which the pleadings show was never accepted by the incorporation of the contemplated corporation and that the only cause of action on the contract would have been that of the corporation upon its incor-



poration. Therefore, plaintiffs urge that the issue on review is whether the agreement was actually a "promoter's contract" giving plaintiffs a cause of action in contract rather than a subscription agreement as found by the trial court. Although the written agreement was captioned "Subscription Agreement" and stated that the plaintiffs and defendant would each purchase one-half the shares in the corporation to be formed, a reading of the document as a whole clearly shows it is a much broader pre-incorporation contract creating certain reciprocal rights and duties binding and benefiting both parties. Rather than focusing solely on the number of shares, par value, authorized capital, classes of stock, etc., as is generally the tenor of a subscription agreement, the bulk of this contract is concerned with the agreement to form the corporation and the duties and obligations of the respective parties -- plaintiffs to move to Springfield and create a number of statues and to subsequently work for the corporation for a salary, with defendant to secure the premises, prepare them, and advance plaintiffs money to live on and finance their delegated preparatory duties.

Illinois Law and Practice, Corporations, Section 28, says

"Generally a promoter is one who alone or with others undertakes to form a corporation and to procure for it the rights, instrumentalities, and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business; and whether a person is or is not a promoter must be in each case determined with due regard to all the circumstances." 13 I.L.P. Corp. § 28, p. 286.



Since the case is before us only on the pleadings the precise status of the parties has not been established, but it may be fairly implied from the contract that the defendant sought out the plaintiffs and suggested the enterprise, with the subsequent agreement requiring plaintiffs to supply the talent and labor and the defendant to supply the capital and managerial services. Therefore, defendant appears to have been the moving force behind the idea of incorporation -- it was he who conceived the idea of the wax museum, initiated the gathering of the necessary talents, instrumentalities, and capital to launch the enterprise. Since this appeal only involves the dismissal of the complaint and not the merits of the suit, it is unnecessary to belabor the point of the exact status of the defendant and the pre-incorporation agreement except to say that it was clearly more than a mere subscription agreement. By becoming parties to it, the plaintiffs did more than merely agree to take and pay for original unissued shares of a corporation to be formed. The contract contained a future employment agreement, refers to an ancillary financing agreement, and imposes other obligations and rights on both parties and it was therefore error for the trial court to dismiss Count I.

Plaintiffs are appealing from the dismissal of six counts in addition to Count I and from the order denying leave to amend those seven counts. It has been decided that Count I of the amended complaint did state a cause of action, so should not have been dismissed, but under Supreme Court Rule 341(e)(7), the plaintiffs waived any error as to the other counts which were dismissed by



failure to argue them in their brief. (Ill.Rev.Stat. 1973, ch. 110A, § 341(e)(7).) In any event, since no proposed second amended counts were tendered to the trial court, it would be impossible to determine whether denying leave to amend to include the necessary facts was an abuse of discretion as plaintiffs contend. The matter is therefore reversed and remanded with directions to reinstate Count I along with the remaining Count III.

REVERSED AND REMANDED.

TRAPP, P.J., and KUNCE, J. concur.



191.A.<sup>3D</sup>636  
(24540-4M-9-70) 160-0 

## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE SAMUEL O. SMITH Presiding Judge

HONORABLE HAROLD F. TRAPP Judge

HONORABLE JAMES C. CRAVEN Judge

Attest: ROBERT L. CONN, Clerk.

---

BE IT REMEMBERED, that to-wit: On the 27th day  
of May A. D. 1974, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



## Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

General No. 12308

Agenda 74-105

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from
	)	Circuit Court
BILLY JOE PRESTON,	)	Adams County
	)	
Defendant-Appellant.	)	

---

Mr. JUSTICE CRAVEN delivered the opinion of the court:

The defendant was charged with two counts of armed robbery. As a result of plea negotiations, he entered a plea of guilty and was sentenced to not less than 5 nor more than 15 years on each count, the sentences to be served concurrently. Upon this appeal from the sentences imposed, no questions are raised upon the indictment nor is there any question with reference to compliance with Supreme Court Rule 402 (Ill.Rev. Stat.1973, ch. 110A, ¶ 402), the sole issue upon appeal being that the defendant's negotiated minimum term of 5 years, which was the lowest minimum allowed by law for the offense at the time the plea was accepted, should be reduced or vacated. The Unified Code of Corrections now provides for a 4 year minimum term and the



defendant urges under the long line of cases that hold a case upon direct appeal which has not reached final adjudication is one to which the new Code of Corrections will apply.

The penalty for the offenses being prosecuted as of the date of the offense was a minimum term of 2 years. As of the date of sentencing, the penalty provision provided for a minimum term of not less than 5 years and now under the Unified Code of Corrections the minimum term is 4 years. Although this was a negotiated plea and the 2 and 5 year minimum were discussed, it is clear from this record that the trial court imposed the minimum term applicable to the offense as of the date of sentencing. We see merit to the appellant's claim that the sentence should be vacated and this cause remanded for the reimposition of sentence in that the minimum term can now permissibly be decreased to a period of 4 years. See People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.

We note that the Illinois supreme court in a recent opinion, People v. Marin, 56 Ill.2d 490, 309 N.E.2d 9, held that upon imposition of a sentence for an offense which at the time of sentencing was not probational and the same became probational under the Unified Code of Corrections, the court deemed it appropriate to vacate the sentence and remand with directions to conduct a new sentence hearing. Such disposition is appropriate in this case. Conviction is affirmed; the



sentence is vacated; and this cause is remanded to the circuit court of Adams County for the reimposition of sentence under the Unified Code of Corrections.

CONVICTION AFFIRMED, SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

SMITH, P.J., and TRAPP, J., concur.



74-79

STATE OF ILLINOIS

People vs. James D. Reynolds



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-four, within and for the Third District  
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STOUWER, Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

May 31, 1974

the Opinion of the

Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Peoria County
	)	
vs.	)	
	)	
JAMES D. REYNOLDS,	)	
	)	
Defendant-Appellant.	)	

---

PER CURIAM

Abstract

---

This is an appeal from a judgment of the Circuit Court of Peoria County finding defendant James D. Reynolds guilty of possession of a controlled substance (less than 200 grams of barbituric acid) and theft. Pursuant to a negotiated plea defendant was sentenced to not less than one (1) year nor more than three (3) years in the penitentiary. The Office of the State Appellate Defender was appointed to represent defendant in the appeal in this Court. The State Appellate Defender has now moved for leave to withdraw as counsel on appeal for appellant in accordance with the precedent in Anders v. California, 386 U.S. 738, and states that an examination of the record by counsel (accompanied by a brief in support of counsel's conclusion) has forced counsel to the conclusion that an appeal would be wholly frivolous and could not possibly be successful.

Defendant Reynolds was charged with felony theft in one count and with unlawful possession of less than 200 grams of the substance containing a derivative of barbituric acid, as indicated. On November 3, 1973, he pleaded guilty to both charges and following plea negotiations he was sentenced to not less than one year nor more than three years in the Illinois State Penitentiary.



The indictment was proper in form and substance. Prior to the defendant's plea of guilty, a motion filed on his behalf to suppress evidence was denied. The police had stopped the automobile of defendant, on the basis of information furnished by an informer and made a warrantless search of the auto prior to defendant's arrest. Even if the ruling of the trial court was improper it could not be challenged on appeal because a voluntary plea of guilty waives any prior defect other than those of a jurisdictional nature and such plea of guilty also waives prior violations of constitutional rights. (People v. Brown, 41 Ill. 2d 503, 244 N.E. 2d 159; People v. Stanley, 50 Ill. 2d 320, 278 N.E. 2d 792).

When the plea hearing commenced, counsel who had been retained by defendant, advised the court that a guilty plea had been negotiated whereby defendant would plead guilty to both counts of the indictment if the State recommended concurrent sentences of one to three years and dismissed several outstanding charges. The trial court concurred in the negotiated arrangement prior to accepting the plea. Defendant expressed satisfaction with his attorney and the court explained the nature of the charges simply by reading the indictments which were phrased in simple, non-technical language. Defendant responded that he fully and completely understood the nature of the charges. A factual basis was ascertained when the State's Attorney informed the court in the presence of defendant, that on March 27, 1973, Bogard's Drug Store had been burglarized and that drugs containing a derivative of barbituric acid, having a value in excess of \$150, were taken. On the same day, police, acting pursuant to information from an informant, stopped the automobile defendant was driving and discovered a bag containing the drugs stolen from Bogard's Drug Store. While the factual basis may not have clearly shown the requisite intent to support theft, the recent unexplained possession, when considered in conjunction with the defendant's understanding and acquiescence to the nature of the charge, constituted substantial compliance with the requirements of Supreme Court Rule 402. (Ill. Rev. Stat. 1973, ch. 110A §402).



The record shows that the Court clearly advised Reynolds of his right to a jury trial, his right to plead not guilty, his right to remain silent, and his right to confront witnesses. The court determined that he waived such rights. The record discloses that the plea was voluntary and that there were neither threats nor promises to induce the plea, other than the plea negotiations.

The court also explained the possible minimum and maximum sentence on each count, the mandatory parole term, and the possibility of consecutive sentences. The court inaccurately informed defendant that the theft of property in excess of \$150 was a Class 4 felony with a minimum of one year, a maximum of three years, and a two year parole term, since Felony theft is a Class 3 felony with a minimum of one year and a maximum of ten years, and a three year parole term, Ill. Rev. Stat. 1973, ch. 38 §16-1. Under the circumstances it is clear that this understatement of the possible penalty could not have misled or prejudiced or influenced the defendant's decision to enter into the negotiated plea. Defendant actually received a more beneficial result than he had bargained for since he received a minimum sentence for a Class 3 felony whereas he had bargained for a maximum sentence for a Class 4 felony. [People v. Walsh, \_\_\_\_\_ Ill. App. 3d \_\_\_\_, 279 N.E. 2d 739 (1st Dist., 1972); People v. Hudson, 7 Ill. App. 3d 800, 288 N.E. 2d 533]. The circumstance that defendant is subject to an additional year of parole for the theft conviction is of no consequence to defendant since he is subject to three years of parole under the concurrent controlled substance conviction in any event.

Since this court has previously ruled that an indictment charging possession of a minimum quantity of a controlled substance cannot be challenged by an appellant who has pleaded guilty to such indictment where the challenge is based on the language of the act to the extent that it prohibits a "substance containing" rather than proscribing the controlled substance itself. It was observed



that the defendant in such event is not aggrieved (People v. Peterson, \_\_\_\_ Ill. App. 3d \_\_\_\_, 307 N.E. 2d 405 (Third Dist. 72-309, 1974), and this Court has also rejected the contention that the graduated penalties of the Controlled Substances Act are unconstitutional (People v. Campbell, \_\_\_\_ Ill. App. 3d \_\_\_\_, 307 N.E. 2d 395, Third Dist. 72-198, 1974 — leave to appeal pending in Supreme Court Case No. 46605). As indicated by counsel for appellant, no purpose would be served by again urging these issues in this Court since they could not possibly succeed. In the event the Illinois Supreme Court should declare the Controlled Substances Act unconstitutional in the future, a collateral remedy will be available to the defendant.

On the basis of the record in this cause, therefore, we concur in counsel's contention that there is no basis for maintaining an appeal in this cause and that the continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Peoria County is, accordingly, affirmed, and for the reasons stated, the motion of the State Appellate Defender to withdraw as counsel for defendant James D. Reynolds is allowed.

Judgment Affirmed and  
Withdrawal Motion Allowed.

Stouder and Dixon, JJ. concur.



3D  
19 I.A. 642

72-367

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

JUN 5 - 1974

the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures  
following, viz:



NO. 72-367

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

**FILED**  
JUN 5 - 1974

ADVANCE CONSTRUCTION COMPANY, INC., )  
a Delaware Corporation, )  
 )  
Plaintiff, )

v. )

BROOKHAVEN MANOR WATER COMPANY, )  
an Illinois Corporation, )  
 )  
Defendant. )

LOREN J. STROYZ, Clerk pro tem  
Appellate Court, 2nd District

Appeal from the  
18th Judicial  
Circuit  
Du Page County

Hon. George B.  
Van Vleck,  
Judge presiding

\_\_\_\_\_  
BROOKHAVEN MANOR WATER COMPANY, )  
 )  
Third Party Plaintiff-Appellee, )

v. )

ILLINOIS BELL TELEPHONE COMPANY, )  
 )  
Third Party Defendant-Appellant. )

Mr. JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

Brookhaven Manor Water Company (Brookhaven), third party plaintiff, entered into an oral contract with Advance Construction Company, Inc., (Advance) who is not a party to this appeal.

Advance agreed to repair one of Brookhaven's water lines which third party defendant had allegedly been damaged by/Illinois Bell Telephone Company (Bell). Upon completion of its contractual duties, Advance tendered an itemized bill to Brookhaven for payment. Although Bell had allegedly agreed to pay for these repairs, it refused to do so when it was presented with Advance's bill by Brookhaven. Advance then brought suit against Brookhaven on the contract with it; and Brookhaven filed a third party tort complaint against Bell for the damage Bell allegedly caused to Brookhaven's water line.



Upon completion of a trial without a jury, an order was entered in the Du Page County circuit court finding Brookhaven contractually indebted to Advance in the amount of \$2319.53 plus court costs. Judgment was also entered against Bell in favor of Brookhaven for the same amount based on the third party complaint. Bell then appealed to this court after its post trial motion was denied.

Upon the filing of Brookhaven's appellate brief, Bell filed a motion to strike that brief contending that it did not respond to any of the issues raised in Bell's appellate brief. Having previously ordered that Bell's motion would be considered after oral argument, we now deny the motion and direct our attention to the merits of this appeal.

From our review of the briefs and record, we find that the question which is dispositive of this appeal's result is whether or not the judgment against Bell was based on findings of the trial judge that were manifestly against the weight of the evidence.

The damage which Bell allegedly caused to Brookhaven's water line occurred in the Fall of 1967. At that time Bell was trenching ground in order to lay underground telephone cable in an area that is presently part of the city of Darien in Du Page County. With the exception of one residence, the "Camden house", the area in which Bell was trenching was vacant but was in the prefatory stages of development for a residential subdivision which had been platted.

In apparent anticipation of this development, in 1965 Brookhaven laid underground water lines and water mains throughout this proposed platted subdivision. In the autumn of 1967 Bell was trenching along the platted utility and drainage easement at the rear (east) of certain platted and



staked out lot lines. While trenching along this easement in a northerly direction, Bell's machine came in contact with one of Brookhaven's one inch copper water lines which was approximately 36 to 42 inches underground. As a result, shortly thereafter Brookhaven's president, Ervin Betke, noticed water coming out of the ground in the immediate area of Bell's equipment and men. This break and leak in the water main occurred in the easement along the rear (east) lot line of lot 307; approximately 30 feet south of the north lot line of lot 307.

Betke then told one of Bell's line foremen, Harold Kolzow, of the damage. There is a conflict in the testimony as to whether Betke told Kolzow to "crimp" the line and repair it, or whether he simply directed Kolzow to "crimp" it and that Brookhaven would repair it at a later date. Nevertheless, Bell merely crimped the water line to stop the water flow and recovered the trench. Betke testified that he assumed that Bell had repaired the line at that time because the flow of water had ceased soon after he had discussed the matter with Kolzow.

In the spring of 1970 the well at the "Camden house" went dry and the owners desired water service from Brookhaven. The "Camden house" is located just east of the point where the water line had been broken and crimped by Bell. After connecting the "Camden house" plumbing to Brookhaven's water line, no water service was available to the house. Betke then became aware of the fact that Bell had only crimped the line in 1967,

and Betke testified that he then contacted Bell and received authority from one of its supervisors "to repair the break and send them [Bell] a bill." Accordingly,



Betke contacted Advance and told them to "repair the service and restore the ground around the break." By this time, the lots on which the utility and drainage easement was located were improved with single family residences; including lot 307 where the line had been broken and crimped.

In its initial efforts to repair the broken one inch copper water line to afford water service to the "Camden house", Advance located a break in the one inch copper line in the utility easement behind lot 307. At trial, both Bell and Brookhaven agreed that this break was in substantially the same area that Bell had been trenching in 1967 when the leak occurred.

Advance's underground construction superintendent, Arthur Carlquist, testified that after this break was repaired, service was restored. He further stated that he was then directed by Brookhaven to relay a whole new copper water line from the point of the break behind lot 307 out to the water main which was located in the parkway in front of lot 307; a distance of approximately 160 feet.

Betke, in contradistinction to Carlquist's testimony, testified that there was no water service at the "Camden house" after Advance had repaired the broken line behind lot 307. For this reason Betke stated that he directed Advance to do whatever was necessary to restore the service. After Advance then found and repaired a second break in the one inch copper line to the west of the first break, water service was still unavailable. Betke testified that he then directed Advance to relay a whole new copper line out to the water main in front of lot 307. It is noteworthy that the undisputed testimony at trial indicated that Bell had never trenched anywhere west of the first break.



The new copper water line was laid between lots 307 and 306 in another utility easement which ran east and west and which intersected the north-south easement behind lot 307 where the first break was repaired. In order to relay this new line it was necessary for Advance to tear up and restore sod and concrete. Advance's itemized bill for all of these services totalled \$2319.53 and it properly proved this amount in its contract action against Brookhaven.

Although Brookhaven's third party complaint against Bell appears to sound both in contract and in tort, at oral argument its counsel stated that the complaint was premised on a traditional tort negligence theory. He further stated that was the theory Brookhaven proceeded with at trial. Accordingly, we have <sup>considered</sup> this appeal with this in mind.

We are cognizant of the established principle of appellate review that a reviewing court "will not disturb a trial court's finding and substitute its own opinion unless the holding of the trial court is manifestly against the weight of the evidence." (Reese v. Malahn (1973), 53 Ill. 2d 508, 292 N.E.2d 375.) After a thorough study of the record, we believe that the judgment against Bell is manifestly against the weight of the evidence.

There was absolutely no proof at trial that any of Bell's workmen had caused any damage to Brookhaven's one inch copper water line anywhere other than the first break found in the pipe located in the north-south easement behind lot 307. Brookhaven's own witness, Ervin Betke, testified that the "real problem" which was preventing water service for the "Camden house" was "definitely" west of the first break found.

Furthermore, the record is devoid of any proof that Bell's workmen trenched in any area west of the north-south easement behind lot 307. Rather, the evidence adduced at trial illustrates, without conflict, that after Bell completed



its trenching behind lot 307 it proceeded to trench in an easterly direction in the easement behind lot 305.

In essence, the record is barren of any proof which would illustrate that any negligence on the part of Bell was the proximate cause of any damage caused to the copper water line anywhere to the west of the first break found behind lot 307. It is elementary tort law that in order to properly impose liability on a negligent actor for harm caused to another or to the property of another, it is necessary not only to prove that the actor's conduct be negligent toward the person or the property, but also that the actor's negligence be a legal cause of the harm or damage inflicted. Restatement (Second) of Torts §§ 328A, 430 (1965); Pitts v. Basile (1966), 35 Ill.2d 49, 219 N.E.2d 472.

In an apparent attempt to satisfy this indispensable proximate cause requirement, Brookhaven has now, in essence, attempted to infer that only Bell could have caused all of the damage to the copper water line. Brookhaven draws this inference from the trial testimony of its president, Betke, that no other workmen except those from Bell were on the premises digging "in the easement" from 1965 when the copper water line was installed until 1970 when the damage was repaired. Although it is unclear whether Betke was referring to the north-south easement behind lot 307 or the east-west easement north of lot 307, the uncontradicted testimony at trial illustrates that Bell never trenched in the east-west easement where the second break was found, and where Brookhaven deemed it necessary to relay a new copper water line.

Accordingly, linking any negligence on the part of Bell to the damage caused to the copper water line west of the first break found behind lot 307 would require one to enter



into the realm of sheer speculation. Thus, we reiterate that which we stated in Haggerman v. National Food Stores, Inc.

443

(1972), 5 Ill.App.3d 439, 283 N.E.2d 321, 324:

"Liability cannot be predicated upon surmise or conjecture as to the cause of the injury; proximate cause can only be established when there is a reasonable certainty that defendants' acts caused the injury. (Citations). It is patent that no liability existed unless defendants' alleged negligence was the legal cause of plaintiff's injury. (Citation ). Failing to establish this element of proximate cause, plaintiff had not sustained his burden of making a prima facie case of negligence . . . ."

Having failed to establish by a preponderance of the evidence (Brett v. F. W. Woolworth Co. (1973), 8 Ill. App. 3d 334, 290 N. E. 2d 712) that Bell's negligence was the proximate cause of any damage to the one inch copper water line other than the first break found in the easement behind lot 307, judgment was erroneously awarded in favor of Brookhaven for the entire cost of repairs to the water line. The proof propounded by Brookhaven at trial only warrants that tort liability be imposed upon Bell for an amount which represents the cost of repairing the first break found in the easement behind lot 307 and for restoring the ground around that break.

For the reasons stated, the judgment of the circuit court of Du Page County in favor of Brookhaven is reversed and the case is remanded for determination of damages in an amount not inconsistent with this opinion.

REVERSED and REMANDED.

P.J. MORAN and J. SEIDENFELD Concur.



72-211) Cons.  
72-369) Cases

UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       )   ss.  
Second District       )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable GLENN K. SEIDENFELD, Justice  
          Honorable L. L. RECHENMACHER, Justice  
                 LOREN J. STROTZ   , Clerk  
                 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit:   On

**JUN 4 - 1974**

the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



NO. 72-211  
NO. 72-369 ) Cons.

Abstract

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

JUN 4 - 1974

LOREN J. STROTZ, Clerk pro tem  
Appellate Court, 2nd District

PATSY JEWELL VAN BUSKIRK, )  
 )  
Plaintiff-Appellee, ) Appeal from the Circuit  
 ) Court of the 16th  
v. ) Judicial Circuit,  
 ) Kane County, Illinois.  
STEPHEN TUCKER VAN BUSKIRK, )  
 )  
Defendant-Appellant. )

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant's two appeals are here consolidated. In case No. 72-211, defendant claims that it was error for the trial court to deny his petition for a change in custody of the minor children. In case No. 72-369, he asserts that the trial court was without authority to award plaintiff \$850 (attorney's fees and costs) toward the expense of her participation in defendant's appeal of the decision in case No. 72-211 or, in the alternative, that the court abused its discretion in granting the award.

Between October, 1971, and July, 1972, three hearings were held. Therein it was revealed that the parties were divorced on June 10, 1971; that the decree awarded the plaintiff, among other things, the



family home, custody of the couple's two daughters (then ages 4 and 9) and child support in the sum of \$50 per week; that on July 30, 1971, defendant married a woman whom he had dated prior to his divorce; that shortly after the divorce it became known that Kenneth Billingsley, a convicted felon, was living openly and unmarried with plaintiff and the children; that two weeks after the relationship had begun, Billingsley was arrested; that the home awarded to plaintiff by the decree was placed for sale in September, 1971; that plaintiff subsequently realized a net profit of \$5300 from the sale, moved to her mother's home in Casey, Illinois, and then to a rented trailer in Charleston, Illinois.

At the initial hearing, plaintiff indicated to the court that her relationship with Billingsley had ended. At a subsequent hearing it was disclosed that Billingsley had been acquitted of attempted murder but was on bond pending charges for the unlawful use of a weapon and possession of a controlled substance, that plaintiff had paid Billingsley's \$2000 legal fee and that the two had married in November, 1971.

There was conflicting evidence regarding plaintiff's care of the children. Called by the defendant, a 15 year old sitter who had worked for plaintiff through the summer of 1971, testified that she had observed plaintiff's home was not "appreciably neat," the children's clothing clean but unironed, their food inadequate and that, during a one and one-half week period in July, two sacks of marijuana remained on the top of the TV set in plaintiff's home. (No explanation for the identification of the substance was offered or sought.) The sitter never observed Billingsley or the plaintiff smoking the substance. A neighbor and another sitter, both called to testify on behalf of the plaintiff, related that the children were well cared for, that plaintiff was a good housekeeper and a fit mother.

After considering all the evidence, the trial court determined the issues in favor of the plaintiff and denied defendant's petition for a change in custody of the children. (Defendant appeals the



denial of his petition in case No. 72-211.)

The third and final hearing was initiated by plaintiff's motion for an award of attorney fees and costs to enable her participation in the appeal. Therein it was disclosed that plaintiff and Billingsley were living in Casey, Illinois; that she was expecting a child; that Billingsley was engaged in his own painting and decorating business, earning approximately \$500 per month; that she was without funds and in debt; and that defendant was living in an 8 room house with his second wife but was \$1100 in arrears for child support. Plaintiff requested that defendant be ordered to pay \$1500 toward her anticipated legal fees. The court ordered defendant to pay the sum of \$850. (Defendant appeals this order in case No. 72-369.)

Defendant argues that the trial court's denial of a change in custody was against the manifest weight of the evidence and an abuse of discretion. For this court to so conclude, it would be necessary that "compelling evidence \*\*\* be presented, proving the mother to be an unfit person, \*\*\* or there must be a positive showing that to deny custody to the mother would be for the best interests of the child[ren]." Nye v. Nye, 411 Ill. 408, 414 (1952). Defendant relies on the facts that, one, plaintiff allowed Billingsley to live with her and the children for a two week period and, two, Billingsley is a convicted felon.

As to the first factor, plaintiff admitted sleeping with Billingsley during the two weeks that they lived together. Neither was married at the time. (Defendant, however, admitted that while still married to the plaintiff he had engaged in similar conduct with the woman who became his second wife.) Plaintiff's behavior, though not adulterous, may be considered misconduct but there is no evidence that the children were aware of such misconduct. Under the circumstances, and especially since she married the only man with whom she was indiscreet,



plaintiff's conduct does not disqualify her as custodian of the children. Nye v. Nye, supra. See also Collings v. Collings, 120 Ill. App. 2d 125 (1970); Jayroe v. Jayroe, 58 Ill. App. 2d 79 (1965).

Defendant asserts that because plaintiff married a convicted felon a change of custody is dictated. The record is void of any proof that plaintiff's marriage adversely affected her concern for the future welfare of the children or that it interfered with her being an affectionate, dutiful mother interested in properly guiding and caring for them. It cannot be concluded as a matter of law that because plaintiff's husband is an ex-convict, plaintiff is unfit to properly raise her children. To hold otherwise would establish a precedential rule that conviction of a felony automatically precludes the individual (and thus his or her spouse) from having custody of any minor child regardless of the surrounding circumstances. We are not inclined to so rule.

The trial court, able to observe the witnesses and assess their credibility, is given broad discretion in resolving the issue before it. (Aud v. Etienne, 47 Ill. 2d 110, 113 (1970).) From our review of the record we find no abuse of that discretion and the order denying defendant's motion for a change in custody is affirmed.

Pending appeal in case No. 72-211, plaintiff, having been awarded the sum of \$850 toward anticipated attorney fees and costs, moved this court to require defendant to file an appeal bond. The motion was denied. Plaintiff was granted two extensions of time for the filing of her answering brief. Although no further extension of time was requested, the case was submitted solely on defendant's brief. Having failed to participate in the appeal of case No. 72-211, plaintiff has forfeited her right to the award of legal fees. The order in case No. 72-369 is therefore reversed.

Judgment in case No. 72-211, affirmed;  
Judgment in case No. 72-369, reversed.

SEIDENFELD and RECHENMACHER, J.J. - concur.



57767



19 I.A. 667<sup>3D</sup>

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
	)	
v.	)	
	)	
LLOYD WILLIAMS,	)	HONORABLE
	)	FRED G. SURIA,
Defendant-Appellant.)	)	PRESIDING

PER CURIAM\* (FIRST DISTRICT, FIFTH DIVISION):

After a bench trial, defendant, originally charged with murder, was found guilty of a lesser included offense of voluntary manslaughter and sentenced to a term of five to fifteen years. On appeal, he contends (1) he was not proven guilty beyond a reasonable doubt; (2) the finding of guilty of voluntary manslaughter was based upon a misapprehension of the law of justifiable use of force; and (3) his sentence of five to fifteen years is excessive.

At trial, the following evidence was adduced: Janis Boler testified for the State that she was living with Tommie Johnson and on March 21, 1971, at about 8:45 P.M. she went with him to visit defendant and Velma Porter at their apartment. She and Johnson were getting ready to leave about 1:30 A.M. when defendant came out of the bedroom and said, "Pops" (the nickname for Johnson) who, when he turned around, was shot by defendant. There had been no argument between the two men, and Johnson had no weapon in his hand. When defendant grabbed Velma, Janis ran to the front door and finding it locked ran to the bathroom and tried to close the door, but defendant pushed the door in and aimed the gun at her head. When she tried to run out of the bathroom, she was shot by defendant in the neck. He then went into the living room where Johnson was and said, "Oh this so and so is dead." Defendant then came and knelt down next to Janis who held her breath, making believe that she was dead. He then went over to Velma and beat her with a gun, after which he put the gun in Velma's pocket and left

---

\*Mr. Justice Lorenz did not participate.



the apartment. Janis then ran out of the apartment, screaming for help and, after the police arrived, was taken to the hospital where she remained for about four days.

George Fox and Arthur J. Hannus, Chicago Police officers, testified for the State that on March 22, 1971, they were investigating a report of a shooting in the building where defendant lived, and they saw Janis Boler running in the lobby. They went to defendant's apartment, where they found Johnson dead from a shot in the right side of his head. Johnson was in a sitting position on the couch with his legs crossed and a toothpick in his mouth. A gun was recovered from the top of the bed and two other guns from between the mattress and box spring. Velma Porter had been shot and was lying unconscious on the bedroom floor. There were no weapons found near Johnson.

William Jannotta, a Chicago Police detective, testified that he was assigned the investigation of the killing of Johnson and that on March 30, 1971, defendant, accompanied by his attorney, surrendered to the police.

Defendant stipulated to the ballistics report which showed that the weapon recovered from his apartment was the weapon used to kill Johnson and to the coroner's report stating the cause of death was a bullet wound of the head and brain.

Velma Porter testified for the defense that she had been living with defendant and that on March 21, 1971, Janis Boler and Johnson came to the apartment with another man. Johnson told defendant he wanted to rob this man and an argument ensued between Johnson and defendant over whether or not they would rob him. This man left the apartment and she observed Johnson pull out a knife and defendant grabbed a gun. Janis then hit her with a vodka bottle and, as she went into the bedroom, she heard a gun go off. She did not see what happened between Johnson and defendant in the living room. She crawled back into the living room and was shot by defendant.



Tony Williams testified for the defense that she heard the arguing coming from defendant's apartment and then Janis Boler banged on her door. Janis was smoking a marijuana cigarette and Tony asked her to leave, which she did. About 15 minutes later Tony went to defendant's apartment and heard Johnson and defendant arguing in the bedroom. She observed another man leave defendant's apartment and go down in the elevator. Defendant asked her to go to the store and buy some liquor.

Defendant testified that Tommie Johnson was a recruiter for the Black P. Stone Nation and that Johnson on several occasions had tried to get him to join the organization and had threatened to kill him several times for refusing to join. He knew Johnson always carried a weapon. On March 21, 1971, Johnson came to his apartment with Janis and another man and stated that he wanted to rob the other man. When defendant refused, an argument ensued during which the other man left the apartment. Johnson then threatened to kill him, and when Johnson went into his pocket defendant ran into the bedroom and returned with a .38 caliber revolver in his hand. At this time Johnson was seated on the couch with his hand in his pocket. Defendant testified that when Johnson took his hand out of his pocket, defendant saw a knife and immediately shot Johnson twice. Janis then came out of the bathroom and tried to grab the gun and, in the ensuing struggle, Janis was shot. Defendant left and went to St. Louis and subsequently surrendered himself to the Chicago Police.

#### OPINION

##### I.

Defendant first contends that the evidence failed to establish his guilt beyond a reasonable doubt. He argues that the testimony of Janis Boler, the State's only occurrence witness, was incredible, contradictory and unworthy of belief and that the State did not prove his use of force was unreasonable.



Defendant was found guilty of the crime of voluntary manslaughter, which is defined by section 9-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 9-2):

"(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

- (1) The individual killed; or
- (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable."

Article 7 of the Criminal Code defines the amount of force a person may use in defense of his person (Ill. Rev. Stat. 1971, ch. 38, par. 7-1). The statute provides:

"A person is justified in the use of force against another when and to the extent that he reasonably believes that this conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

It is well settled that in a bench trial the credibility of witnesses is for the trial judge to determine. People v. Wright, 3 Ill.App.3d 262, 278 N.E.2d 175, and that the issue of self-defense is a question of fact. People v. Kendricks, 4 Ill.App.3d 1029, 283 N.E.2d 273. Ordinarily the decision of the trial court will not be disturbed unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385.



A careful examination of the record here discloses ample evidence to support a finding of voluntary manslaughter. Defendant's own testimony established that there had been an argument on the evening in question. He testified that when he observed Johnson put his hand into his pocket he went into the bedroom and returned with a loaded .38 caliber revolver. At that time Johnson still had his hand in his pocket. Defendant testified that when Johnson started to take his hand out of his pocket, defendant saw a knife in Johnson's hand and immediately fired two shots into his head. Janis Boler testified that Johnson did not have a weapon in his hand and none was found in the immediate area around his body by the police, who arrived shortly after the shooting. The police found Johnson seated on the couch with his legs crossed and a toothpick in his mouth, indicating that he had probably not made any move toward defendant. We do not believe that this evidence was so unsatisfactory as to raise a reasonable doubt of defendant's guilt.

## II.

Defendant next argues that the finding of guilty of voluntary manslaughter was based upon a misapprehension of the law concerning the justifiable use of force. In support of this contention, he refers us to the following statement of the trial judge:

"In arriving at that conclusion, I would note, for the record, that I would find there was in fact an altercation or argument. That taking the defense, in its best light, there was a weapon in the hand of the victim, a knife, if there be one. There was not just provocation for his shooting, since, obviously, a pistol is as adequate a defense against a knife as it could be. Under these circumstances, my finding would be guilty of voluntary manslaughter."

Defendant argues that the quoted statement indicates the trial judge was influenced by his belief that a gun is always excessive force when used against a knife, which he says is erroneous as a matter of law. It appears to us that there is no basis in the record from which it could be inferred that the trial judge was



stating as a general principle of law that a pistol is always an adequate defense against a knife. The statement referred to by defendant is but one portion of the summation in which the trial judge stated that, under the circumstances of this case, the pistol in defendant's hand was an adequate defense against the knife which defendant alleged was in the hand of Johnson. It is apparent from our review of the entire record that the finding of guilty was based upon the trial judge's determination that the degree of force used by defendant here was not justified.

Defendant's final argument is that his sentence of five to fifteen years is excessive and should be reduced since he was a first offender. The power to reduce sentences should be exercised with caution and circumspection, because the trial judge has a superior opportunity in the course of the trial and the hearing in aggravation and mitigation to determine a proper sentence than do reviewing courts. People v. Caldwell, 39 Ill.2d 346, 236 N.E.2d 706; People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673. Defendant here was convicted of voluntary manslaughter in violation of section 9-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 9-2), the penalty for which is imprisonment in the penitentiary for a term of from one to twenty years. The sentence imposed is within the statutory limits, and is not disproportionate to the nature of the offense. See People v. Martinez, 4 Ill.App.3d 1072, 283 N.E.2d 268, where this court refused to reduce a sentence of 10 to 15 years on the charge of voluntary manslaughter where the defendant had no prior criminal record.

We affirm the judgment and sentence of the trial court.

Affirmed.

Abstract only.



3D

The logo of the Chicago Bar Association, featuring the text "CHICAGO BAR" arched over "ASSOCIATION" inside an oval border.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY.

HONORABLE  
JAMES M. BAILEY,  
PRESIDING.

HONORABLE  
JAMES M. BAILEY,  
PRESIDING.

On June 5, 1972, shortly after 9 P.M., Robert Krener, a CTA driver, was driving his bus north on Central Park Avenue along his established route. He was alone on the bus at the time, when he stopped at the intersection of Roosevelt Road and Central Park. Someone yelled "bus" and he opened the door of the vehicle and two black men entered the bus, the first one carrying a .45 automatic. The man announced that this was a holdup and told Mr. Krener to keep driving. After they started up, the robbers relieved their victim of \$30, his watch, and his CTA bag. They did not wear masks of any kind, and the man, whom Mr. Krener identified as the defendant, stood a foot to a foot and a half away from him during the course of the robbery. Although he kept his gun to the victim's head, Mr. Krener was able to get a clear view of his face, which was reflected in the outside rear view mirror of the bus. The defendant then allegedly threatened to kill Mr. Krener, because he did not have much money. Mr. Krener then stepped on the accelerator and turned left onto Homan Avenue. The defendant then pressed the air brake, and he and his companion jumped off the bus and ran



east on Grenshaw Street.

The second witness to testify for the State, Frank Scott, stated that he was parked in a vacant lot near the scene of the robber's exit with his car headlights on. Two men ran in the path of the car lights, approximately forty feet away, one of whom was carrying a small black leather bag. Mr. Scott identified him as the defendant, whom he had seen previously in the neighborhood, and he stated that he knew his first name to be Flonzell. At the close of the State's case, the defendant elected to stand on his motion for a directed verdict, and, after closing arguments, the jury found him guilty of the crime of armed robbery.

The first issue which the defendant raises is that the State failed to prove him guilty beyond a reasonable doubt, because the identification testimony was improbable. We find this contention to be without merit. It is a well established principle of law in this State that a reviewing court will only set aside a jury verdict of guilty where the evidence is so unreasonable or palpably contrary to the verdict that a reasonable doubt exists. (See People v. Sumner, 43 Ill. 2d 228 at p. 232.) The facts of the case at bar hardly warrant any such conclusion by this court, but rather convincingly demonstrate the guilt of the accused. The State's case consisted of the testimony of two independent witnesses, the victim and an unrelated observer, who saw the accused fleeing from the scene of the crime and knew him by face and name from the neighborhood. The victim had more than ample opportunity to observe the defendant during the commission of the offense through his outside mirror, and his positive identification, believed by the jury, would have been sufficient in itself to convict the accused. The independent corroboration of Mr. Scott, which aided in identifying the accused substantiated the victim's identification. As was stated by our Supreme Court in the case of People v. Stringer, 52 Ill. 2d 564, 289 N.E. 2d 631, (at pp. 568-569):



"The defendants also argue that the evidence was insufficient to establish their guilt beyond a reasonable doubt in that Smith lacked credibility, his identification testimony was weak and the mother of each defendant testified that her son was home asleep at the time in question. We cannot agree, for '[w]e may not substitute our judgment for that of a jury on questions involving the weight of the evidence or the credibility of the witnesses [citations], and we will not reverse a criminal conviction unless the evidence is so improbable as to raise a reasonable doubt of guilt.' (People v. Mills, 40 Ill. 2d 4, 19; accord, People v. Nicholls, 44 Ill. 2d 533.) 'It is also undisputed in Illinois that where the identification of the accused is at issue, the testimony of one witness is sufficient to convict, even though such testimony is contradicted by the accused, provided the witness is credible and he viewed the accused under such circumstances as would permit a positive identification to be made. (People v. Brinkley, 33 Ill. 2d 403; People v. Washington, 26 Ill. 2d 207; People v. Mack, 25 Ill. 2d 416; People v. Cox, 22 Ill. 2d 534.)' (People v. Watkins, 46 Ill. 2d 273, 281; accord, People v. Catlett, 48 Ill. 2d 56.) In this case Smith observed the assailants from across the street during daylight, he described their clothing and was able to identify them in police photographs and at trial. The testimony as to Stringer's oral admission was un rebutted. Defense witness Carl Dunbar admitted having initially identified Taylor as one of the assailants. The evidence is not so 'unreasonable, improbable or unsatisfactory as to leave a reasonable doubt of the defendant[s'] guilt' (People v. Scott, 38 Ill. 2d 302, 306), and the jurors were in a more advantageous position than we to assess the credibility of the witnesses."

The second issue which the defendant has raised is also without merit. He contends that the remarks of the prosecutor during closing argument with respect to his failure to testify and his failure to produce alibi witnesses so prejudiced his case that a new trial is required. Having carefully reviewed the text of the argument in question, we find that, while the prosecutor's closing remarks on this first point might not be a textbook model of propriety, in essence all that was asserted was that the State's evidence was uncontradicted. Since such a commentary is permissible (See People v. Wollenberg, 37 Ill. 2d 480, at p. 488), and since it did not refer inferentially to the defendant's failure to testify, as is urged here, a new trial is not warranted on this ground. Similarly, the defendant's assertion that the prosecutor commented unfairly on the defendant's failure to produce his alibi witnesses is also



unfounded. As was stated by this court in the case of People v. Moore, 9 Ill. App. 3d 231, 292 N.E. 2d 42, (at p. 232):

"There is a recognized exception to this general rule. When a defendant injects into the case his activities with potential witnesses during a particular period of time ostensibly for the purpose of establishing an alibi, his failure to produce such witnesses is a proper subject of comment on the part of the State. People v. Swift, 319 Ill. 359, 150 N.E. 263; People v. Lenihan, 14 Ill.App.2d 490, 144 N.E. 2d 803; People v. Gray, 57 Ill. App. 2d 221, 206 N.E. 2d 821; People v. Sanford, 100 Ill. App. 2d 101, 241 N.E. 2d 485."

Here the prosecutor did nothing more than comment on the defense counsel's opening statement and he did not state that any specific witness, also available to him, did not testify. This reference to the statement certainly does not require that we award the defendant another trial, particularly in light of the overwhelming evidence which was presented against him.

Finally the defendant urges that the sentence imposed was excessive because it was based upon the trial judge's mistaken recollection of the events of the crime. The cases which the defendant cites for this point are not applicable to the facts of the case before us, as they involve cases where perhaps only a very minimal amount of property was stolen, and no threat was made on a victim. Although Supreme Court Rule 615 (b) (4) gives a reviewing court the power to reduce a sentence without reversing a conviction, such authority is only used where the sentence is so excessive as to be considered an abuse of discretion. We do not feel that the attendant circumstances of this case warrant such a finding. While it is true that the trial judge perhaps incorrectly recollected a particular account of the crime, in view of the violent nature of the attack on a bus driver and the defendant's past record, we cannot say that the sentence imposed was excessive. The judgment of the circuit court of Cook County is therefore affirmed.

Judgment affirmed.

GOLDBERG and BURKE, JJ., concur.



3D  
19 I.A. 680.



58088

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
	)	
PAUL ROBINSON,	)	HONORABLE
	)	ARTHUR V. ZELEZINSKI
Defendant-Appellant.	)	PRESIDING.

PER CURIAM \* (First Division, First District):

Paul Robinson, defendant, was found guilty after a bench trial of possession of a controlled substance (Ill.Rev.Stat. 1971, ch. 56-1/2, par. 1402) and criminal trespass to a motor vehicle (Ill. Rev.Stat. 1971, ch. 38, par. 21-2). He was sentenced to a term of one year in the House of Correction on each charge, the sentences to run concurrently. Defendant argues (1) that the complaint filed against him charging possession of a controlled substance is insufficient to state an offense, (2) that there was a total lack of proof that the substance seized by the arresting officer was in fact a controlled substance, and (3) that the evidence was insufficient to establish his guilt of the crime of criminal trespass to a motor vehicle beyond a reasonable doubt.

At the motion to suppress and at trial, the following evidence was adduced: Gary Hudik, a Chicago Police Officer, testified that on March 21, 1972, at 10:30 p.m., he was on routine patrol in a marked police vehicle when he observed the defendant seated in the driver's seat of a vehicle which was double parked at 4847 S. Indiana, Chicago, Illinois. The vehicle was a 1967, white, two-door Buick with license number HA 272. He pulled his squad car behind defendant's vehicle and tapped on the horn. Defendant did not move his vehicle and Officer Hudik and his partner went over to defendant's vehicle. Defendant and another man were in the vehicle. Defendant stated that he was waiting for a girl who was in the tavern. The officer asked defendant to produce a driver's license and defendant replied that

\* Mr. Justice Burke did not participate.



he did not have one. Defendant was then asked who owned the vehicle and defendant replied that it belonged to his mother. The officers then placed defendant under arrest for obstructing traffic and having no driver's license. A search of the defendant revealed a glass vial containing pills, sticking half-way in his pocket and half-way underneath his belt. An examination of the vehicle revealed that the ignition had been pulled out and was lying on the floor. There was a hole in the dashboard where the ignition used to be. Sitting on the back seat of the vehicle behind the driver's seat was a lock puller.

Officer Hudik testified that the pills recovered from defendant's person were sent to the Chicago Police crime laboratory for analysis; that he received a laboratory report of the pills, under the number with which he had submitted them, by Chicago Police chemist Robert Boese, who analyzed three red capsules and found them to be a total weight of .78 grams found to be a derivative of barbaturic acid.

Robert Halsey testified that he was the owner of a 1967, white, two-door, Buick Electra with license number HA 272. On March 21, 1972, he found his car missing and notified the police. He next saw his car in the Chicago Police Department lot. At that time, the ignition to his car was pulled out. He did not at any time give the defendant permission to enter or take his vehicle.

Paul Robinson, defendant, testified that on March 21, 1972, he was waiting for a bus when Jeffrey Joyce pulled up in a white Buick and offered him a ride. They picked up a girl and proceeded to the tavern where they were subsequently arrested. The girl went into the tavern. He observed that Joyce was drunk and volunteered to drive. Defendant got behind the wheel of the car, and they were waiting for the girl to come out of the tavern when Officer Hudik pulled up. Defendant testified that he did not know the car was stolen and never observed the hole in the dashboard. Defendant denied that he ever told Officer Hudik that the car belonged to his mother.



Defendant's first contention is that the complaint charging him with possession of a controlled substance was insufficient to state an offense. The complaint charging defendant stated:

"Paul Robinson has, on or about March 21, 1972, at 4847 S. Indiana, Chicago, Cook County, committed the offense of possession of a controlled substance in that he knowingly did then and there unlawfully have in his possession and under his control a controlled substance, To wit: Dangerous drug otherwise than as authorized in the Illinois Controlled Substances Act, in violation of chapter 56-1/2, section 1402, Illinois Revised Statutes and against the peace and dignity of the People of the State of Illinois."

Defendant now urges that this complaint failed to specify the nature and elements of the offense since the term dangerous drug is not listed on any of the schedules relating to controlled substances.

To sufficiently state an offense, a complaint or indictment must inform the accused of the nature of the charge so as to enable him to prepare a defense and to serve as a bar for future prosecutions for the same offense. (People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Niceties or strictness of pleadings are supported only where a defendant would be surprised at trial or be unable to meet the charge or prepare a defense. People v. Greenwood, 115 Ill.App.2d 167, 253 N.E.2d 72.

In People v. Russell, 13 Ill.App.3d 497, 301 N.E.2d 85, the defendant was convicted of the offense of attempting to obtain a drug by fraud or deceit in violation of the old Drug Abuse Control Act. The defendant argued that the complaint failed to state an offense because it did not use the statutory terms "stimulant" or "depressant." The complaint described the drug as merely a "dangerous drug." In rejecting defendant's argument, this court said:

"The single word 'dangerous,' used in the complaint, would seem to be, at least for lay persons, a reasonable and inclusive definition of both types of drugs. Use of this word in the complaint eliminates the need for pleading the disjunctive phrase appearing in the statute (People v. Heard, 47 Ill.2d 501, 504,



266 N.E.2d 340) as well as the need for lengthy chemical analysis of the questioned substance before filing the complaint."

In this case, a reading of the complaint, charging defendant with possession of a controlled substance in violation of chapter 56-1/2, section 1402 of the Illinois Controlled Substances Act, and that statute clearly indicates the crime charged. The complaint adequately informed defendant of the nature of the charge so as to enable him to prepare a defense and was sufficient to serve as a bar to future prosecutions for the same offense.

Defendant's second contention is that there was a total lack of proof that the substance seized from the defendant was in fact the controlled substance, relying on People v. Resketo, 3 Ill.App.3d 633, 279 N.E.2d 432. There, an arresting officer found a vial containing a white powder in defendant's apartment. The officer at trial testified that the vial was transported to the Chicago Police crime laboratory. The Assistant State's Attorney then interrupted the officer's testimony by reading the crime laboratory report. The court in Resketo found that there was a complete lack of proof that the substance found by the arresting officer was actually the same material that was subject to chemical tests.

In People v. Williams, 9 Ill.App.3d 466, 292 N.E.2d 204, the defendant was convicted of possession of a controlled substance. At trial, the police officer who arrested defendant testified that he took the evidence found on defendant's person to the Chicago Police crime laboratory and received a report from the laboratory stating that the evidence contained five tinfoil packets containing 1.3 grams of heroin. On appeal, defendant argued that there was a complete lack of evidence tending to prove that the substance involved was a controlled substance. This court rejected defendant's contention and distinguished Resketo, stating:

"However, unlike the Resketo case, the evidence here is clear that the very same material found by the arresting officer was



tested and found to be heroin. That in and of itself is more than sufficient proof that the substance involved was a controlled substance under the statute."

In this case, Officer Hudik searched the defendant and found a vial containing pills which was transported to the Chicago Police crime laboratory under a specified number. Further, he received a report that under the same number from the laboratory stating that the pills in question were tested by Chicago Police chemist Robert Boese and found to contain .78 grams of a derivative of barbaturic acid. Prior to trial, the Assistant State's Attorney asked defense counsel if he would stipulate to the laboratory report and chain of evidence if it became necessary during the course of trial, and defense counsel replied that he would. Defense counsel did not at any time object to the trial testimony of Officer Hudik regarding the laboratory analysis, nor did he indicate any surprise. The evidence was sufficient to establish that the powder in the vial found on defendant's person was the same substance tested by the police chemist and that it contained a derivative of barbaturic acid, a controlled substance.

Defendant's final contention is that the evidence was insufficient to establish his guilt on the charge of criminal trespass to a vehicle beyond a reasonable doubt. He first argues that the State failed to prove the identity of the vehicle corresponding to that alleged in the complaint. Where a crime against property is charged, the identity of the property is a material element of the offense which the State must prove beyond a reasonable doubt. People v. Acevedo, 5 Ill.App.3d 968, 284 N.E.2d 488.

The complaint charged that defendant had committed the offense of criminal trespass to a motor vehicle in that he knowingly and without authority entered "a 1967 Buick 2 dr. Vin. No. 484577H299724 the property of Robert Halsey." At trial, Robert Halsey testified that he was the owner of a 1967, white, two-door, Buick Electra with license number HA 272, which was stolen on March 21, 1972. Chicago Police Officer



Hudik testified that on March 21, 1972, he arrested the defendant while seated in a 1967, white, two-door Buick with license number HA 272. The identification of the vehicle by Halsev and Officer Hudik as to year, make, type of vehicle, color and license plate number was sufficient to show ownership as alleged in the complaint. People v. Johnson, 13 Ill.App.3d 204, 300 N.E.2d 535.

Defendant's second argument is that the evidence was insufficient to establish beyond a reasonable doubt the requisite knowledge on the part of the defendant at the time he entered the vehicle. Defendant was convicted of criminal trespass to a vehicle in violation of section 21-2 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 21-2), which states:

"Whoever knowingly and without authority enters any vehicle, aircraft or watercraft or any part thereof of another without his consent \* \* \* ."

Under this section, knowledge is an essential element which must be proven. (People v. Davis, No. 58337, January, 1974.) Knowledge may and often must be established by circumstantial evidence. People v. Zazzetti, 6 Ill.App.3d 858, 286 N.E.2d 745.

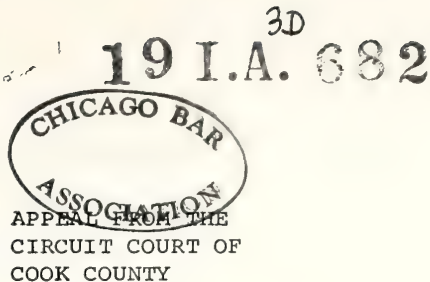
The evidence established that when the police approached defendant's vehicle, defendant was seated in the driver's seat. The ignition to the car had been popped out and was lying on the floor. There was a hole in the dashboard where the ignition used to be and there was a lock puller lying on the rear seat directly behind defendant. In addition, when the police questioned defendant, he stated that the car belonged to his mother. After a complete review of the entire record, we conclude that there was sufficient evidence from which a trial judge could properly conclude that defendant's guilt on the charge of criminal trespass to a vehicle had been established beyond a reasonable doubt.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



58336



PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.	)	
	)	HON. ALBERT S. PORTER,
WILLIE MC LILLY,	)	Presiding
	)	
Defendant-Appellant.	)	

\* PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

The defendant, Willie McLilly, was convicted following a bench trial of theft of \$95 from Charles Griffin and theft of \$5 from Betty Kelly, and sentenced to concurrent terms of one year in the Cook County Jail. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a).) Defendant contends: (1) that he was not adequately apprised of his right to a jury trial; (2) that the trial court should have granted a continuance when the State dropped a pending felony charge (robbery) and filed new misdemeanor complaints on the date set for preliminary hearing; and (3) that the defendant was not proven guilty beyond a reasonable doubt because the testimony of Betty Kelly was untrustworthy and because the State did not prove he intended to deprive the complainants permanently of their property, since defendant's objective was collection of a debt which does not constitute theft.

When the case was called on August 31, 1972, the following proceedings occurred:

"THE COURT: The Public Defender has been appointed to represent you. Is the State and Defense ready?

MR. GOLDBERG (assistant public defender): Ready. Is it a trial or a preliminary hearing?

MR. DE JOHN (assistant State's attorney): We have additional charges here, Judge.



THE COURT: You are filing additional charges?

MR. DE JOHN: Reduced charges.

MR. GOLDBERG: We are ready for trial.

MR. DE JOHN: Judge, the State would ask leave to file additional charges of theft against the defendant Melvin Johnson, complainant being Charles Griffin and Betty Kelly. Tendering copies of the complaint.

THE COURT: These charges arise out of incident for which you are in court today.

MR. DE JOHN: I also have two additional charges of theft against the defendant McLilly, complainant being Charles Griffin and Betty Kelly.

THE COURT: What is it, sir, that you want to say?

MR. MC LILLY: By them lowering the charges, we want a continuance. I am not ready for trial, and I like to have my bond lowered.

THE COURT: Lets answer that in a few minutes. Get the reduced charges filed.

MR. DE JOHN: Motion of State to file the reduced charges.

THE COURT: The charges are against both defendants?

MR. DE JOHN: Yes, sir.

THE COURT: Now, the charges you are proceeding with are two counts of theft, two complaints alleging theft. Defendant McLilly is charged with battery and theft?

MR. DE JOHN: Yes.

THE COURT: Is the defendants ready?

MR. MC LILLY: No, your Honor.

THE COURT: Why not?

MR. MC LILLY: Well, your Honor, I was under the impression that I was being charged with armed robbery and that --



THE COURT: Let's take that point up first. Now, you were charged with armed robbery. What the State did is they reduced the charges, which were the same factual situation of the armed robbery. Instead of charging you with an armed robbery, you are charged with theft for that incident, which is a lesser charge. The armed robbery was a felony and this is a misdemeanor. The fact that you were on a felony, it seems you would also be ready on the misdemeanor, because it is the same situation.

MR. MC LILLY: Well, your Honor, I would like time to get me an attorney for this case.

THE COURT: Do you have funds for which to hire an attorney?

MR. MC LILLY: I think I could get some from some of my friends.

THE COURT: But you don't have the funds?

MR. MC LILLY: No.

MR. DE JOHN: Judge, can I just interject here that the police told me that on the last date the defendant said the same thing; that he wanted a continuance to hire an attorney.

THE COURT: All right, Mr. Johnson, are you ready for trial?

MR. JOHNSON (co-defendant): No, sir.

THE COURT: Why aren't you ready for trial?

MR. JOHNSON: I ain't ready.

THE COURT: You didn't make bond. You rather wait and have the case continued? Is that what you want to do? I am not lowering the bond.

MR. GOLDBERG: It is up to you; do you want want [sic] another continuance?

MR. MC LILLY: All right, I am ready.

THE COURT: Mr. Johnson, are you ready?

MR. JOHNSON: Yes.

THE COURT: Do you waive a jury trial, or do you want a jury trial?

MR. MC LILLY: No jury.

THE COURT: What about you, sir?



MR. JOHNSON: Trial right here.

THE COURT: Both defendants waive jury trials.

MR. GOLDBERG: Yes. The defendants would move to exclude witnesses."

Betty Kelly testified that on July 3, 1972, between 3:30 and 4:00 in the afternoon, she was at home when she heard a knock on the door. She opened the door and saw the defendant, with a pistol in his hand; defendant put his foot in the door and pushed it in, saying, "Betty, I want to pick up some money for some heroin." She said, "Okay", and took some heroin he had given her three days earlier out of the dresser and placed it on the bed. On June 31 (sic) or July 1, the same day defendant brought it to her, she had taken the heroin to the police station and turned it over to the vice officer. Defendant told Johnson to search Griffin and put Griffin's belongings on the bed; Johnson searched him and she saw approximately \$200 or more in tens and fives, a couple of twenties, on the bed. The defendant asked how much money she had and when she told him she had only \$5, he asked Griffin, "How good a friend are you to Betty?", and when Griffin said, "A good friend", defendant said, "Loan Betty \$95." Griffin asked if the defendant was trying to stick him up, but the defendant said, "No, just lend Betty the \$95", and said to Betty, "Get the money" and she took nine tens and a five dollar bill off the bed and gave it to Johnson. On cross-examination, she testified that although she had been convicted for using heroin, her last injection was two months earlier, that Griffin has never been a supplier of narcotics. Sometime prior to July 3 - she couldn't remember the date - defendant gave her ten bags of heroin to sell. She was an addict when the defendant came to her apartment on July 3. She had been unable to sell any of the narcotics,



although she had agreed to do so under pressure from the defendant, who had been there three or four times to collect money for the heroin. A total of \$100 was taken, although there was over \$200 on the bed.

Charles Griffin testified that he was with Betty Kelly in her apartment when the defendant pushed in the door, asking Miss Kelly about some money. His story corroborated her testimony regarding the event itself.

The defendant testified that he went to Miss Kelly's apartment to talk to her about selling drugs, that he knew her well and told her and Griffin they would have to stop selling drugs in the community. He denied having a gun and said he didn't see any money while he was in the apartment and he denied taking any money from Griffin or Miss Kelly. He also denied taking heroin to Betty Kelly's apartment and giving it to her to sell for him. Co-defendant Melvin Johnson also testified and his story corroborated that of the defendant.

At the court's request, the police officer was asked to locate the case report and the case was passed. When proceedings were resumed, it was established that an inventory slip, #95964, indicated Betty Kelly had turned in an "1104 packet, containing white powder" on July 3, 1972.

Defendant relies on People v. Boyd (1972), 5 Ill. App. 3d 980, 284 N.E.2d 699, for the proposition that the public defender appointed to represent him had no opportunity to explain his right to a jury trial to him and, consequently, at counsel's answer, "Yes", that defendant waived jury, was not a sufficient waiver under People v. Sailor (1969), 43 Ill. 2d 256, 253 N.E.2d



397. However, unlike Boyd, the defendant here was no stranger to criminal proceedings as the hearing in aggravation and mitigation showed, and when he answered, "No jury" to the court's question, he voluntarily and intelligently waived his right to a jury. (See People v. Lewis (1973), 13 Ill. App. 3d 688, 301 N.E.2d 159.) Whether a knowing and intelligent jury waiver has occurred depends upon the facts and circumstances in each case. In the case at bar, the colloquy preceding the defendant's explicit statement shows the defendant, who had been convicted of crimes on three previous occasions and had twice been sentenced to Vandalia, was alert to his rights and well understood he was waiving a jury trial. People v. West (1973), 13 Ill. App. 3d 550, 300 N.E.2d 808.

Next, defendant claims the court erred in denying him a continuance. The record, however, shows not that the court denied a motion for continuance, but that the defendant abandoned his request for a continuance and the court never ruled. Moreover, since both charges arose out of the original robbery charge, defendant was not prejudiced and he "cannot claim surprise in suddenly having to defend against a new and distinct charge." People v. Arndt (1972), 50 Ill. 2d 390, 395, 280 N.E.2d 230.

Defendant contends the testimony of Betty Kelly was so untrustworthy that it raised a reasonable doubt as to his guilt. Although her testimony was apparently contradictory on certain points, such as when the narcotics were actually turned over to the police, her story was substantiated by the testimony of Charles Griffin. Their testimony was directly contrary to that of both defendants, who claimed they were trying to dissuade Kelly and Griffin from selling drugs in the neighborhood. This



presented a question of credibility for the trial judge. The fact that Miss Kelly's testimony was impeached in one respect does not mean the court had to disregard the remainder of her testimony. It is the province of the trier of fact, who hears and sees the witnesses, to determine their credibility and a reviewing court will not overturn that judgment merely because of a conflict in the evidence. The evidence here was not so unsatisfactory as to cause a reasonable doubt of guilt to appear. People v. Fleming (1971), 50 Ill. 2d 141, 146, 277 N.E.2d 872.

Finally, the defendant contends that, although the sale of contraband, i.e. narcotics, is illegal, the collection of a debt does not constitute theft and that the defendant sincerely believed the money was owed to him. However, defendant's evidence did not establish that he was trying to collect a debt. His testimony was that he was trying to dissuade Miss Kelly from selling narcotics in the neighborhood and he denied he ever saw money in the apartment. In any event, he cites no authority for the dubious proposition that armed robbery or theft are permissible methods of collecting a debt.

Although not argued by the defendant, we note that theft of property not exceeding \$150 in value is now a Class A misdemeanor. (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 16-1(e)(1).) The Unified Code of Corrections is applicable to cases pending on appeal. (People v. Harvey (1973), 53 Ill. 2d 585, 294 N.E.2d 269.) The Unified Code of Corrections provides that imprisonment for a Class A misdemeanor may be "for any term less than one year." (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-8-3(a)(1).) The



58336

sentences are therefore reduced from one year to 364 days, and the judgments of the circuit court of Cook County, as modified, are affirmed.

JUDGMENTS AFFIRMED AS MODIFIED

\* MR. PRESIDING JUSTICE EGAN took no part



The logo of the Chicago Bar Association, featuring the words "CHICAGO BAR" in an arc at the top and "ASSOCIATION" in an arc at the bottom, enclosed within an oval border.

Appeal from the Circuit  
Court of Cook County.

Chester J. Strzalka, J.

Defendant was charged by criminal complaint with the theft of a 1959 Chevrolet automobile on November 1, 1972. The evidence revealed that the vehicle owner's stepson and a companion observed the defendant enter the vehicle and drive off, gave chase in their own vehicle, and stopped and held the defendant until the police arrived. The defendant, on the other hand, maintained that he was drinking with the stepson and the companion; that the stepson and the defendant drove off in the vehicle in question to purchase more liquor, with the stepson driving; and that the stepson later accused the defendant of stealing the vehicle. The stepson denied having possession of the vehicle on that date, and the vehicle owner denied giving anyone permission to use the vehicle on that date.



When the case was called for trial, and prior to the introduction of the foregoing evidence, the trial court received an affirmative answer from defendant when asked if he wished to go to trial on the matter; the court replied, "All right, I will appoint the Public Defender. Sit over there and he will talk to you.", whereupon the matter was passed. When the case was later recalled, defense counsel was asked by the court, "What's the plea?", to which defense counsel stated, "The plea is not guilty, Judge, and jury is waived. The defendant is ready for trial." Defense counsel later reiterated the plea and jury waiver after the case had again been passed and recalled, to allow counsel to confer with the assistant State's attorney. Defendant was present when defense counsel stated on both occasions the plea and the jury waiver in open court.

The circumstances of the jury waiver in the instant case are identical to those presented in the recent case of People v. Lewis, 13 Ill.App.3d 688, 301 N.E.2d 159, which the court on review held to have constituted a knowing and understanding waiver of the right to the jury trial. The court in the Lewis case further distinguished the cases herein cited by defendant in support of his position; those cases are similarly distinguishable from the case at bar for the same reasons: People v. Baker, 126 Ill.App.2d 1, 262 N.E.2d 7; People v. Boyd, 5 Ill.App.3d 980, 284 N.E.2d 699. The Lewis case is dispositive of the question raised on this appeal.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

THIRD DIVISION: Justice Mejda did not participate.





No. 58399

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT
	)	
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	HONORABLE
D. C. HARDY,	)	THOMAS P. CAWLEY,
	)	PRESIDING.
Defendant-Appellant.	)	

PER CURIAM:

Defendant, D. C. Hardy, was convicted following a bench trial of the aggravated battery of Delmar Hall and theft of a Black and Decker circular saw, the property of Delmar Hall, in violation of Ill.Rev.Stat. 1971, ch.38,pars.12-4(a) and 16-1(a), and sentenced to concurrent terms of one year at the Illinois State Farm at Vandalia. On this appeal, he contends (1) since both convictions arose out of the same conduct, the aggravated battery conviction should be reversed; (2) the theft complaint is void because it omits the word "control" and does not charge an offense; and (3) defendant was prejudiced when the court excluded competent evidence. Since we vacate the theft conviction, as more fully discussed below, we find it unnecessary to discuss defendant's second contention.

At trial, on October 13, 1972, Delmar Hall testified that on August 28, 1972, when he was working as a carpenter in an apartment building at about 2:30 in the afternoon, the defendant appeared and asked for a job and the two men had a conversation for about five minutes. The defendant then took from Hall's hand a Black and Decker power saw which Hall had taken from its case to show the defendant. When the defendant started out of the building with the saw, Hall tried to stop him by grabbing hold of the saw and in this manner with both men pulling at the saw, they scuffled out to the street, at which point the defendant hit Hall around the eyes with his hand, resulting in twelve stitches to his face.



The defendant took the stand and denied that he had ever seen the complainant and testified he was home all day with his girlfriend, Christine Hyde. Except for one time when he arose to get himself something to eat, he said he was in bed all day until 4:00 or 5:00 p.m. when he went into the front room to watch t.v. Christine Hyde, when she testified, said the defendant was home all day, but that he was in the front room and never left that room.

After the State had presented its evidence and rested, and the defendant's motion for a directed verdict had been denied, and after the defendant himself had testified, the defendant called the arresting officer, Chicago Police Officer William Stump, who testified he made the arrest because of a telephone call from the complainant, Delmar Hall, and arrested the defendant at the address given by Hall, explaining to the defendant that he had been named in the robbery. At this point, the defendant moved to recall Hall for recross-examination and, when this motion was denied, on the ground that there had been no redirect testimony, the defendant called Delmar Hall as a defense witness.

Hall testified that a young boy who lived in the neighborhood of the apartment building where he was working at the time of the offense gave him the defendant's name and address. The court sustained a State's objection to counsel's question, "What did he tell you?", on the ground that it called for hearsay evidence. The witness stated he did not know the boy's name and address. Defense counsel moved for a continuance so he could learn the identity of this witness and call him; the motion was denied.

Defendant contends that both offenses arose out of the same conduct. If offenses do arise from the same conduct, judgment may be entered only on the more serious of the two



offenses. (People v. Stewart (1970), 45 Ill.2d 310, 259 N.E.2d 24.) In the case at bar, the theft and aggravated battery were part of the same course of conduct. A single, continuous struggle for the Black and Decker saw began inside the apartment where the complaining witness was working and ended shortly thereafter on the street. The defendant's attack on Hall on the street was directed at obtaining control over the saw so that the entire series of acts were part of one continuing transaction and were not separate and unrelated crimes. In People v. Lilly (March 20, 1974), --Ill.2d--, No. 45788, the court vacated a conviction for indecent liberties where both a rape and indecent liberties convictions were "founded on a single act of the defendant." In the case at bar, since the aggravated battery charge is the more serious, the defendant's conviction for theft and the judgment entered thereon must be vacated. Moreover, although not raised in the briefs, we note that the aggravated battery charge was prosecuted as a misdemeanor, and the penalty for a Class A misdemeanor under the new Unified Code of Corrections is any term less than one year. Ill.Rev.Stat. 1972 Supp., ch.38, par.1005-8-3(a)(1). The sentence for aggravated battery, therefore, is reduced to 364 days.

Finally, defendant claims that the court committed reversible error by excluding competent evidence, i.e., what the unnamed individual said to Hall when he gave him the defendant's name and address as that of the guilty party. The defendant argues that in excluding this evidence, the trial court misapplied the hearsay rule. Defendant contends that since the informer's statements were not being offered by the defendant for the purpose of establishing the truth of what the boy said to Hall, the hearsay rule was not violated. (People v. Carpenter (1963), 28 Ill. 2d 116, 121, 190 N.E.2d 738.) Clearly, the defendant did not offer the boy's statements as evidence of his guilt, and he was not vouching for the credibility of the informant's identification



of him; rather, defendant was attempting to explore the credibility of the complaining witness and to determine to what extent his in-court identification of the defendant was based not upon his personal observation, but upon the word of the third party. Counsel did not seek to introduce hearsay but to discredit the identification of his client because it was based upon hearsay.

The latitude to be enjoyed in the cross-examination of witnesses rests in the sound discretion of the trial court and "only where there is clear abuse of discretion, resulting in manifest prejudice to defendant, will a reviewing court interfere." (People v. DeSavieu (1973), 14 Ill.App.3d 912, 303 N.E.2d 782, 789.) However, restriction of cross-examination under certain circumstances may be reversible error. (People v. Neiman (1964), 30 Ill.2d 393, 197 N.E.2d 8.) And an accused has a right to question identifying witnesses concerning any matter which goes to explain, modify or discredit what has been stated on direct examination. People v. Lewis (March 8, 1974), --Ill.App.3d--, No. 58953.

Since the defendant did not make an offer of proof, it is unclear exactly what evidence he hoped to obtain through statements of the boy. Hall did testify that he did not know the boy's name and that the boy gave him the defendant's name and address. Examination of Hall along these lines did make clear the possibility that Hall's identification was based on what the boy told him. However, since the ruling complained of occurred not during cross-examination of the complaining witness when the State's case was presented, but thereafter when the defendant called Hall to the stand, the trial court did not exceed its discretion. People v. DeSavieu, supra.

Nevertheless, assuming that the trial court did improperly restrict the defense counsel's examination of the complaining witness, this error was harmless beyond a reasonable doubt. (Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824.) The complainant's identification of the defendant at trial was



positive. His opportunity to observe the defendant was prolonged and occurred during daylight hours, both indoors and outdoors. The identification of the defendant in court, therefore, had an origin independent of any information the boy might have supplied. Since the testimony of a single witness, if positive and credible, is sufficient to convict, the defendant was proven guilty beyond a reasonable doubt and any error resulting from the trial court's restriction of defense counsel's cross-examination of the complaining witness was harmless error beyond a reasonable doubt. People v. Jackson (1973), 54 Ill.2d 143, 149, 295 N.E.2d 462.

Accordingly, the judgment of the circuit court of Cook County is affirmed as to the conviction of aggravated battery; as to the offense of theft, the judgment of conviction is vacated; the sentence for aggravated battery is reduced to 364 days, and as modified, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed as modified  
in part and vacated in part.

Third Division. JUSTICE DEMPSEY did not participate.





No. 59345

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
JOHN ARMSTRONG,	)	HONORABLE
	)	KENNETH E. WILSON,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM:

John Armstrong, defendant, was found guilty after a bench trial of deviate sexual assault, two counts of indecent liberties with a child, two counts of contributing to the sexual delinquency of a child and armed robbery, in violation of sections 11-3, 11-4, 11-5 and 18-2 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, pars.11-3, 11-4, 11-5 and 18-2.) He was sentenced to terms of not less than five nor more than nine years on the charges of rape and armed robbery, the sentences to run concurrently. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt and that he was denied equal protection of the law because he was tried as an adult whereas if he were a female, he would have received the protection of the Juvenile Court Act.

The victim, age 15, testified that on April 2, 1972, at 7:15 P.M. as she was returning from a girl friend's home at 40th and State, the defendant walked up behind her and asked her name. When she kept walking, defendant grabbed her arm and put a gun to her head. Defendant threatened her life and forced her under the "L" tracks where he told her that she looked like one of the girls who shot his brother. Defendant then, holding the gun to her side, took her to the basement of a building on Wabash Avenue. When defendant heard some people walking by, he forced her to kiss him. Defendant



then took her to the back of a store on Wabash Avenue but, upon seeing a police car go by, he forced her into a nearby gangway. A dog began barking and defendant took her back to the rear of the store. Defendant forced her to have intercourse with him and performed an act of oral copulation upon her. Defendant also took two dollars from her at gunpoint. Defendant then walked her to the "L" station and asked her name and phone number. The victim testified that she wrote down her name and phone number on a match book and gave it to defendant. Defendant warned her not to call the police or to tell her mother what had occurred, and then left. The victim testified that she immediately went over to the "L" station and told a woman what had occurred. The woman gave her a dime to call the police. She informed the police of what had occurred and they took her to the hospital.

On April 3, 1972, at 2:30 P.M., the victim received a telephone call from the defendant. Defendant asked if she was afraid when he pulled out the gun and she replied that she was. Defendant wanted to make a date with her and asked where she went to school. She replied that she went to Tilden (the victim did not go to Tilden). Defendant stated that he wanted to pick her up at Tilden on Wednesday and she agreed. After defendant hung up, the police were immediately notified. Investigator Pietrozak came to the victim's home and took her to the police station where she viewed photographs but was not able to identify the offender. Later that day, the defendant again called her and stated that he could not meet her on Wednesday. Defendant's mother complained about him being on the phone too long and defendant asked the victim to call him back. Defendant gave her his telephone number and told her that his real name was John Armstrong. The police



were notified of the phone call and they instructed the victim to call defendant back at a set time. The victim called defendant back at the set time and, while talking with him, heard somebody knock on defendant's door. Defendant then said, "You called the police. I thought you didn't call the police." and hung up. The victim testified that later that evening she went to the police station where she viewed a lineup of six men and identified the defendant as the man who raped her. On April 4, 1972, defendant again called and asked her to drop the charges.

John Kuhta, a Chicago Police officer, testified that on April 2, 1972, at 8:25 P.M., he and his partner, Officer Cochran, responded to a call and proceeded to the "L" station at 40th and Indiana. There he met the victim who told him that while returning from a friend's house at 40th and State, she was accosted by a man with a gun who had raped and robbed her. She gave a detailed description of the man, including the fact that he had scars on his face. The victim was taken to Michael Reese Hospital.

Robert Mason, a Chicago Police investigator, testified that he first interviewed the victim in the emergency room of Michael Reese Hospital. On April 3, 1972, he talked with the victim by phone and then in person. Later that day, the victim again telephoned him and, pursuant to that conversation, he received information as to defendant's address from the Illinois Bell Telephone Company. At 11:00 P.M., he proceeded to defendant's apartment at 4101 S. Federal, Chicago, Illinois. Upon entering the apartment, he observed defendant talking on the phone and heard defendant say, "I thought you said you didn't call the police." Defendant then hung up the phone and was placed under arrest. Defendant attempted to remove some papers from his wallet and a search of defendant's



wallet revealed a match book cover which was subsequently identified by the victim as the one on which she had written her name and telephone number. Later that evening, a lineup was conducted at which the victim identified the defendant as the man who had attacked her.

Defendant stipulated that the vaginal smear taken from the victim at Michael Reese Hospital on April 2, 1972, was tested and proven positive for spermatozoa.

Ethel Armstrong, the defendant's mother, testified that on April 2, 1972, her son came home at 7:30 P.M. and remained home the entire evening.

John Armstrong, defendant, testified that on April 2, 1972, at approximately 3:00 P.M., he was entering a neighborhood store when he observed the victim standing nearby. Defendant testified that he said hello and the victim responded. After buying some cigarettes in the store, he came out and began a conversation with the victim. Defendant identified himself as John and the victim told him that she was waiting for her boyfriend. Defendant testified that he started to leave but the victim told him that her boyfriend did not run her. The victim stated that she was tired of waiting for her boyfriend and was going to the "L" station. Defendant walked her to the "L" station where he asked if he could call her. She replied that he could and wrote her name and phone number on a match book cover. Defendant returned to his home at 7:30 P.M. Defendant denied that he ever had a gun or raped or robbed the victim. Defendant stated that he has two scars around his eyes.

Dolores Briggs testified in rebuttal that on April 3, 1972, she was present when the complaining witness received a telephone call. She got on the extension and heard a male voice ask the victim if she was scared when he pulled



out the gun, if she thought he was going to kill her and if she had told her mother what had occurred.

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the testimony of the complaining witness was highly improbable and contained numerous inconsistencies. In rape cases, courts of review are charged with a special duty to scrupulously examine the evidence. (People v. Qualls, 21 Ill.2d 252, 171 N.E.2d 612.) However, in such an examination, courts of review must be careful not to encroach upon the function of the trier of fact to weigh credibility and otherwise assess the evidence presented at trial. (People v. Springs, 51 Ill.2d 418, 283 N.E.2d 225.) The testimony of the complaining witness alone, if positive and credible, is sufficient to sustain a conviction, even though contradicted by the accused. People v. Wright, 3 Ill.App.3d 829, 279 N.E.2d 398.

In the case at bar, the victim testified that while returning home from a girl friend's house, the defendant grabbed her arm and put a gun to her head. The defendant took her to the rear of a store where he forced her to have intercourse with him and performed an act of deviate sexual assault upon her. Defendant then robbed her at gunpoint. The fact that the victim did not cry out or attempt to escape was understandable since her life was threatened by defendant, who was carrying a gun. An attempt to escape or an outcry is not necessary where it would be useless or where the complaining witness is restrained by fear of violence. (People v. Lilly, 9 Ill.App.3d 46, 291 N.E.2d 207; People v. Smith, 32 Ill.2d 88, 203 N.E.2d 879.) The victim promptly reported the incident to the police department and a laboratory analysis of a vaginal smear showed the presence of sperm.



Considering all of the evidence, the fact that the victim gave defendant her name and telephone number does not create a reasonable doubt as to defendant's guilt. Investigator Mason testified that after the victim received a call from the defendant, she immediately contacted him. The victim supplied him with the defendant's phone number. After checking with the Illinois Bell Telephone Company's records, Investigator Mason told the victim to call defendant back and went to defendant's apartment where he heard defendant, who was talking on the telephone with the victim, say, "I thought you said you didn't call the police." After a complete review of the entire record, we find that the complaining witness' trial testimony was positive and credible and, further, that it was corroborated by her prompt reporting of the incident, the vaginal smear taken which showed the presence of sperm, and Investigator Mason's testimony that he overheard the defendant state to the complainant that he thought she said she didn't call the police. The evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

In this regard, defendant also urges that his alibi testimony raised a reasonable doubt as to his guilt. A trial judge is not obliged to believe the alibi testimony of the defendant over the testimony of a complainant, even though the alibi may be established by a greater number of witnesses. (People v. Jackson, 54 Ill.2d 143, 295 N.E.2d 462.) Where, as here, the trial judge who observed the demeanor of the witnesses during trial, found that defendant was the perpetrator of the crime charged and that finding is based upon sufficient evidence, this court will not reverse.

Defendant's second contention on appeal is that



he was denied equal protection of the law because at age 17, he was tried as an adult whereas, if he was a female, he would have received the protection of the Juvenile Court Act (Ill.Rev.Stat. 1971, ch.37, par.702-7.) This identical contention has been recently rejected by the Illinois Supreme Court. People v. Ellis, \_\_\_\_ Ill.2d \_\_\_\_, \_\_\_\_ N.E.2d \_\_\_\_ (No. 45745, decided March 20, 1974). See also People v. McCalvin, 55 Ill.2d 161, 302 N.E.2d 342, and People v. Good, \_\_\_\_ Ill.App.3d \_\_\_\_, \_\_\_\_ N.E.2d \_\_\_\_ (No. 59222, decided March 13, 1974).

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Dempsey did not participate.





59151

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
EARL DELANEY,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM\* (FIRST DISTRICT, FIFTH DIVISION):

A four count indictment was returned against defendant charging him with multiple offenses of armed robbery and aggravated battery. (Ill. Rev. Stat. 1971, ch. 38, pars. 18-2, 12-4.) He was found guilty by a jury of armed robbery and aggravated battery and was sentenced to a term of from 20 years to 40 years on the armed robbery conviction. He contends on appeal that the aggravated battery conviction should be reversed and that the sentence imposed upon the armed robbery conviction is excessive.

John Slater testified for the State that he had attended a plastics show at McCormick Place in Chicago on November 1, 1971; that he left the show between 9:30 and 9:45 P.M. intending to drive westerly to his home, that he missed a route connection with the Stevenson Expressway, and that the next thing he knew he woke up in the hospital two days later. He had been severely beaten and his Helbros wristwatch and \$8 or \$9 in cash had been stolen. Slater, who was 57 years of age, suffered permanent damage to his right ear and his right eye as a result of the beating. These injuries caused him to be hospitalized for a period of 21 days.

Chicago Police Officer Raymond Ray testified for the State that he was cruising the area near 27 East 18th Street in an unmarked police vehicle with his two partners about 10:00 P.M.

---

\*Justice Barrett did not participate.



on November 1, 1971; that the officers observed defendant holding a two-foot length of two-by-four board in his hand; that when defendant observed the police vehicle he threw the board aside; that the vehicle was brought to a halt; that the officers observed blood dripping from the board; and that a trail of blood spots led them to a nearby alley where they found Slater who was in a semi-conscious state and bleeding profusely from the head. As the officers approached Slater, he asked them "not to hit him again." Defendant was found to have had blood on his pants and on his shoes. He was placed under arrest and a search of his person disclosed a Helbros wristwatch and \$8 in cash.

Defendant, testifying on his own behalf, denied striking Slater with the board. He testified that he found the board against a wall in the area where he had been drinking, and that he was in possession of the wristwatch as collateral on a \$5 loan made earlier to an acquaintance named "Willie." Defendant was employed as a laborer on a building wrecking crew at \$150 a week for about a year prior to his arrest, and he lived around the corner from where the arrest took place.

The pre-sentence report submitted by the State in aggravation revealed that defendant had no prior convictions, but the report did reflect numerous conflicts with the police. In mitigation it was disclosed that defendant was 20 years of age, that he was employed prior to the incident, and that he had been living "common law" with a woman and his two children. In passing sentence upon defendant, the court commented upon the nature of the offense, stating:

"That's the worst case I have seen in my entire life as far as the brutal beating you gave that man, and for what; a broken watch and a couple of dollars."

#### Opinion

Defendant was indicted and convicted of the offenses of armed robbery and aggravated battery; he was sentenced only on the armed



robbery conviction. He contends that the conviction for aggravated battery should be reversed on the ground that both offenses arose out of the same conduct. (Ill. Rev. Stat. 1971, ch. 38, par. 1-7(m).) The State has argued that because of the unusual viciousness of the beating administered Slater, defendant demonstrated an intent to do great bodily harm independent of his intent to rob and, therefore, the convictions for both crimes should be affirmed.

In resolving defendant's complaint of multiple convictions for armed robbery and aggravated battery, we are guided by the rule recently enunciated in People v. Ashford, (First Dist. No. 58114)

\_\_\_ Ill. App. 3d \_\_\_, \_\_\_ N.E.2d \_\_\_:

"If a battery takes place in the course of a robbery the question arises whether this use of force was part of the robbery or separate from it. Often, the distinction is not easily made. If the battery immediately precedes the robbery it is normally held to be a component of the robbery (e.g. People v. Randolph (1972), 4 Ill. App.3d 277, 280 N.E.2d 774); if it follows the robbery it is usually regarded as a separate offense (e.g. People v. Baker (1969), 114 Ill. App.2d 450, 252 N.E.2d 693)." [See also People v. Whitley, (First Dist. No. 58228) \_\_\_ Ill. App. \_\_\_, \_\_\_ N.E.2d \_\_\_\_.]

In the instant case, since there was no eyewitness testimony as to the beating and robbery, we cannot make a determination that defendant's conduct consisted of separate and distinct acts constituting the crimes of armed robbery and aggravated battery. Consequently our disposition of this case is controlled by the Supreme Court's holding in People v. Lilly, (No. 45788, filed March 20, 1974) \_\_\_ Ill.2d \_\_\_, \_\_\_ N.E.2d \_\_\_\_\_. In Lilly the defendant was found guilty of the offenses of rape of a 15 year old girl and indecent liberties with the same victim. He was sentenced only on the rape conviction although judgment was entered on both verdicts. The court held that the defendant was correct in his contention that the trial court erred in entering judgment on the indecent liberties conviction since under the



circumstances there could be but one conviction and, accordingly, it vacated the trial court's judgment as to the indecent liberties conviction. Following this rule, we therefore vacate defendant's conviction for aggravated battery.

Defendant also argues that the sentence was excessive. In People v. Caldwell, 39 Ill.2d 346, 236 N.E.2d 706, the defendant had been found guilty of murder; the trial court imposed a sentence of 50 years to 100 years, with the comment that the crime had been committed in "cold blood" and without reason. No mitigating circumstances could be found on appeal to detract from that conclusion.

In the instant case the remarks of the trial court concerning the brutality of the crime are fully supported by the facts, in particular by the extent of the injuries suffered by the victim. As noted in Caldwell, the authority given to reviewing courts to reduce sentences pursuant to Supreme Court Rule 615(b)(4) (50 Ill. 2d R. 615) should be applied with considerable circumspection since the trial court ordinarily has superior opportunity during the trial and the hearing in aggravation and mitigation to make a sound determination in that regard. The penalty imposed in the instant case cannot be said to have been disproportionate with the offense of which defendant was found guilty, and we will not disturb the sentence.

People v. O'Dell, 8 Ill. App.3d 203, 289 N.E.2d 686, cited by defendant in support of his position, is clearly distinguishable from the instant case. In O'Dell the court on review affirmed the maximum sentence imposed in deference to the specific findings of the trial court as to the seriousness of the crime involved but reduced the minimum term imposed because the record disclosed that the chance of the defendant's repeating a criminal offense was "highly unlikely." In the case before us the sole matters which



weigh in defendant's favor are his age, his employment and his previous clean record which have been held by this court to be insufficient in themselves to warrant a reduction in penalty by a reviewing court. (Cf. People v. Jackson, 103 Ill. App.2d 209, 243 N.E.2d 551.) On the contrary, weighing heavily against defendant is the senseless brutality of the offense and the apparent lack of remorse on defendant's part reflected in the record. Accordingly the sentence for armed robbery is affirmed.

For the reasons given above the judgment entered by the circuit court with regard to the offense of aggravated battery is vacated and the judgment and sentence for the armed robbery conviction are affirmed.

AFFIRMED IN PART AND VACATED IN PART.

Abstract Only.





3D  
19 I.A. 742

58504

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
RAYMOND BARTEMIO,	)	HON. ROBERT A. MEIER, III,
	)	Presiding.
Defendant-Appellant.	)	

\*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Raymond Bartemio (defendant) was found guilty after a bench trial of the crimes of aggravated battery and burglary in violation of secs. 12-4(a) and 19-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, pars. 12-4(a) and 19-1.) He was sentenced to a term of five to ten years on each charge, the sentences to run concurrently. Defendant appeals, arguing only that the trial court abused its discretion in denying his application for probation.

Since defendant does not challenge the sufficiency of the evidence against him, the facts may be summarized. At approximately 12:30 P. M. on June 2, 1970, James Lamczyk returned to his apartment at 1808 Armitage, Melrose Park, Illinois. He noticed that the door knob of his front door was bent out of shape and his key would not open the lock. As Lamczyk attempted to gain entry, the door to his apartment was opened from the inside. Defendant ordered Lamczyk into the apartment and hit him over the head, rendering him unconscious. Lamczyk received nine stitches in his head for the injuries he received.

Defendant's only contention on appeal is that the trial court erred in denying his application for probation. The granting of probation rests within the discretion of the trial court and the trial court's determination is subject to review only

\*Mr. Justice Burke did not participate.



to the extent of ascertaining whether the trial court did in fact exercise discretion or whether it acted in an arbitrary manner. (People v. Saiken, 49 Ill. 2d 504, 275 N.E.2d 381; People v. Vincson, 15 Ill. App. 3d 934, 305 N.E.2d 671.) In People ex rel. Ward v. Moran, 54 Ill. 2d 552, 301 N.E.2d 300, the Illinois Supreme Court reviewed the authority of the appellate court to reduce a penitentiary sentence to probation under Supreme Court Rule 615. The court stated:

"After a review of this court's decision in consideration of the statutory authority entrusted to the trial court, we hold that our Supreme Court Rule 615 was not intended to grant a court of review the authority to reduce the penitentiary sentence to probation."

In the case at bar, the defendant committed a burglary during the course of which he committed an aggravated battery upon the victim who came into the apartment. Prior to sentencing, the trial judge conducted an extensive hearing in aggravation and mitigation. Considering these facts and defendant's prior record adduced at the hearing in aggravation and mitigation, which consisted of six prior convictions and three prior penitentiary sentences, we do not believe that the trial court acted in an arbitrary manner in denying defendant's application for probation. While defendant in his brief argues certain facts that occurred between the date of sentencing and the date of filing of the brief, these facts are not relevant to the determination of whether or not on the date of sentencing the trial judge abused his discretion in denying defendant's application for probation.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment Affirmed.

(Abstract Only)





58568

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.	)	
	)	HON. FRANK J. WILSON,
JOSEPH CARLTON,	)	Presiding
	)	
Defendant-Appellant.	)	

\* PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Joseph Carlton, defendant, was found guilty after a bench trial of the crimes of rape and robbery in violation of sections 11-1(a) and 18-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 11-1(a), 18-1). He was sentenced to a term of from seven to twenty years on each charge, the sentences to run concurrently. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt on either charge and that his sentences are excessive and should be reduced.

At trial, the following evidence was adduced: Vernell Dodson testified that on February 11, 1972, at approximately 11:00 P.M., she left work to go home. As she got off the C.T.A. bus in the area of 47th and Wabash, she observed the defendant and a second man walking west on 47th Street. As she walked down the street, the defendant grabbed her right arm while the second man grabbed her left arm and put his arm around her neck. The men took her into a gangway and told her not to scream or run. The men took her through an alley into a yard where the second man took the bag she was carrying, looked through the bag and slapped her in the face. The men then took her back down the

\* HALLETT, J. did not participate



alley toward 46th Street into the yard of an apartment building. There defendant took her purse and removed her money. The second man said that she better have \$30 or better in her purse. The men said that it didn't make too much difference how much money she had because they were going to kill her anyway. The men then took her up the back stairs of a building onto the third floor porch where defendant ordered her to take off her clothing. She removed her clothing and defendant ordered her to lie down. Defendant then had intercourse with her. She was crying at this time. She got up and the second man pushed her up against the wall and had intercourse with her. The men then ordered her to get dressed. She put on her pants and boots, but not her underwear. The second man opened a razor and said that this was to make sure that she didn't try to run or do anything funny. They then proceeded downstairs through an alley to 45th Street. As they were about to cross the street, the second man removed his arm from around her neck and she ran to a nearby car, telling them that she had just been raped. Two men got out of the car and the second man then fled. The defendant was wearing an earring in his left ear. The men in the car drove Mrs. Dodson home, where she immediately called the police. The police took her to Michael Reese Hospital where she was examined. Mrs. Dodson testified that she did not scream during the incident because she was afraid that she might get killed.

On May 10, 1972, she was returning home with two friends when she observed the defendant on the street. She stopped Officer Wheaton's squad car and informed him that she had seen the man who had attacked her. After other officers arrived, she identified the defendant as one of her attackers.



Dan Matejko, a Chicago Police Officer, testified that on May 10, 1972, in response to a call from Officer Wheaton, he met Vernell Dodson who identified the defendant as the man who had attacked her. The defendant was placed under arrest. Defendant's left ear was pierced and he was wearing an earring.

It was stipulated that a medical examination of Vernell Dodson at Michael Reese Hospital on February 12, 1972, revealed the presence of sperm.

Charles Allison, a Chicago Police Officer, testified that on February 12, 1972, pursuant to a call of a rape, he proceeded to 4558 South Wabash, Chicago, Illinois. At that address he and his partner spoke with Vernell Dodson who stated that she had been attacked by two men. Mrs. Dodson told him that she had seen one of the offenders on a prior occasion. Officer Allison testified that he went to the third floor porch of the building located at 4523 South State, where he found Mrs. Dodson's undergarments. The porch was snowy and damp.

Rosa Lee Huff, the complainant's mother, testified that on February 12, 1972, at approximately 1:00 A.M., her daughter came home in an excited state and said that she had just been raped. Her daughter was crying and her clothes were muddy.

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt on the charge of rape. In rape cases, courts of review are charged with a special duty to carefully examine the evidence. (People v. Qualls, 21 Ill. 2d 252, 171 N.E.2d 612.) However, in such an examination, courts of review should be careful not to encroach upon the function of the trier of fact to weigh



credibility and otherwise assess the evidence presented at trial. (People v. Springs, 51 Ill. 2d 418, 283 N.E.2d 225.) The testimony of the prosecutrix alone, if positive and credible, is sufficient to sustain a conviction for the crime of rape. People v. Lilly, 9 Ill. App. 3d 46, 291 N.E.2d 207.

In the case at bar, the testimony of Vernell Dodson was positive and credible. She stated that while returning home from work, the defendant and a second man grabbed her as she walked down the street. As one man held each of her arms, they took her through a gangway and an alley into a back yard, where defendant took her purse and removed the money therefrom. Her life was threatened. The men forced her onto the third floor porch, where both men forced her to have intercourse with them. The fact that Mrs. Dodson did not cry out or attempt to escape was understandable since she was overpowered by two men who had threatened to kill her. An attempt to escape, a struggle or an outcry by a prosecutrix is not necessary where it is useless or where she was restrained by fear or violence. (People v. Lilly, 9 Ill. App. 3d 46, 291 N.E.2d 207; People v. Smith, 32 Ill. 2d 88, 203 N.E.2d 879.) Further, Mrs. Dodson promptly reported the incident to the police and a laboratory analysis showed the presence of sperm. When the police went to the scene of the incident, they found Mrs. Dodson's undergarments lying on the third floor porch where the incident occurred. After seeing and hearing all of the evidence, the trial judge found that defendant's guilt had been established beyond a reasonable doubt. After a complete review of the entire record, we cannot say that his determination was erroneous.



Defendant's second argument on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt of the offense of robbery. Defendant reasons that the facts as adduced at trial demonstrate that he was guilty of theft from the person and not of robbery. Robbery is defined by section 18-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-1) as the taking of "property from the person or presence of another by the use of force or by threatening the imminent use of force." The use of force or intimidation is the difference between theft and robbery. People v. Howell, 11 Ill. App. 3d 391, 296 N.E.2d 760.

In the case at bar, Vernell Dodson testified that as she was walking down the street, the defendant and a second man each grabbed one arm. They took her through a gangway and an alley, threatening to kill her. This evidence was sufficient to establish that the defendant took property from Vernell Dodson through the threat of force and intimidation.

Although not argued by defendant in his brief, we have noted that defendant's sentence for robbery violates the Unified Code of Corrections. Since defendant's case has not yet reached the stage of final adjudication, the Unified Code of Corrections is applicable. (People v. Chupich, 53 Ill. 2d 572, 295 N.E.2d 1.) The Code provides that robbery is a Class 2 felony (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 18-1), the penalty for which is a maximum term not in excess of 20 years (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-8-1(b)(3)) and a minimum term of one year, unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term which shall not be greater



than one-third of the maximum term (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(3)). Here, defendant's sentence of seven to twenty years for robbery is improper in that the minimum exceeds one-third of the maximum. Defendant's minimum sentence on the charge of robbery must therefore be reduced to a term of six years and eight months.

Defendant's final argument is that his sentence is excessive and should be reduced. While this court has the authority to reduce the sentence, the Supreme Court has indicated that this authority should be exercised with considerable caution and circumspection. (People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673.) The imposition of a sentence is within the discretion of the trial court and will not be reversed on review unless it is manifest in the record that the sentence is excessive and not justified. (People v. Keene, 1 Ill. App. 3d 720, 274 N.E.2d 130.) After a complete review of the facts of this case and defendant's prior record, we conclude that the sentences imposed by the trial judge, as modified, are not excessive.

Defendant's minimum sentence on the charge of robbery is reduced to a term of six years and eight months, and the judgments of the circuit court of Cook County, as modified, are affirmed.

JUDGMENTS AFFIRMED AS MODIFIED





59645

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
	)	
	)	HON. ROBERT E. CHERRY,
WILLIE D. WILLIAMS,	)	Presiding
	)	
Defendant-Appellant.	)	

\* PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Willie D. Williams, defendant, was found guilty after a bench trial of the crime of robbery in violation of section 18-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-1). He was sentenced to a term of three to nine years.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are that defendant did not knowingly and understandingly waive his right to a trial by jury and that the evidence was not sufficient to establish defendant's guilt beyond a reasonable doubt because the identification testimony was insufficient. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on December 13, 1973. He was informed that he had until March 14, 1974, to file any additional points he might choose in support of his appeal. He has not responded.

\* HALLETT, J. did not participate



The first possible argument which could be raised on appeal is that defendant did not knowingly and understandingly waive his right to a trial by jury. The transcript demonstrates that when the case was called, defense counsel, in defendant's presence, said, "Bench trial, your Honor." This statement by defense counsel made in defendant's presence could itself be considered sufficient to constitute a valid jury waiver. (People v. Sailor, 43 Ill. 2d 256, 253 N.E.2d 397.) However, the transcript demonstrates that after defense counsel's statement, the trial judge specifically advised the defendant that he had a right to a jury trial. Defendant stated that he understood his rights but wished a "bench trial." Defendant also stated that he had voluntarily signed a jury waiver. The record adequately demonstrates that defendant knowingly and intelligently waived his right to a trial by jury. People v. Sanders, 14 Ill. App. 3d 826, 303 N.E.2d 552.

The second possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt because the identification testimony was insufficient. At trial, Cecelia Thatcher, the complainant, testified that on February 20, 1973, at 12:25 P.M., she was walking east on Jackson Blvd. at approximately 213 W. Jackson Blvd., Chicago, Illinois. As she crossed an alleyway, the defendant grabbed her shoulder bag. She screamed and struggled for possession of her bag. Two men, hearing her screams, chased the defendant and apprehended him a short distance down the alley. The men held the defendant until police officers arrived. From the time defendant grabbed her shoulder bag until the police officers arrived, defendant was never out of her sight.



In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt will the findings of the trial court be disturbed. (People v. Hampton, 44 Ill. 2d 41, 253 N.E.2d 385.) The identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness credible, even though it was contradicted by the defendant. (People v. McVet, 7 Ill. App. 3d 381, 287 N.E.2d 479.) We have reviewed all of the evidence adduced at trial and find that the testimony of Miss Thatcher was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt, even though defendant presented testimony to the contrary.

We have examined the record and concur in the opinion of the public defender that the arguments thus raised do not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED; JUDGMENT  
AFFIRMED.



19 I.A. 765<sup>3D</sup>



58066

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
vs.	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
THOMAS JACKSON,	)	
	)	HONORABLE MAURICE D. POMPEY,
Defendant-Appellant.)	)	Presiding.

PER CURIAM:

Thomas Jackson, defendant, was found guilty after a bench trial of the offense of criminal trespass to a vehicle in violation of Section 21-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 21-2). He was sentenced to a term of 120 days in the House of Correction. On appeal, defendant argues that he was not proven guilty beyond a reasonable doubt because the evidence failed to establish the prerequisite knowledge on the part of the defendant (i.e., that, when defendant entered the vehicle, he knew that it was the vehicle of another who had not authorized defendant, either directly or indirectly, to enter it).

At trial, the following evidence was adduced: Frank Cary testified that he is the owner of a 1960, white Chevrolet with Illinois license number 959959. On the morning of June 13, 1972, his car was stolen. He did not at any time give defendant permission to enter, tamper with, or use his vehicle.

Chicago Police Officer William Felt testified that on June 13, 1972, at 9:35 P.M., he observed defendant driving a 1960 Chevrolet, Illinois license number 959959, eastbound on 76th Street. The vehicle ran a red light at Vincennes Street. Officer Felt testified that, as he stopped the vehicle, two passengers jumped out of the vehicle, ran down an alley, and jumped over a fence. Defendant, who was driving the vehicle, was placed under arrest.



Defendant testified that on June 13, 1972, at 1:00 A.M., he received the 1960 Chevrolet from a friend of his by the name of Frank. Defendant testified that he had known Frank for one year but did not know his last name. Defendant testified that he was by himself when stopped by the police officers. When confronted with Police Officer Felt's prior testimony, defendant admitted that there were two other passengers in the vehicle when it was stopped who jumped out and ran.

Defendant's only argument on appeal is that he was not proven guilty beyond a reasonable doubt because the evidence failed to establish the prerequisite knowledge on the part of the defendant. Defendant was convicted of criminal trespass to a vehicle in violation of Section 21-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 21-2). Under this section, knowledge is an essential element which must be proven. People v. Owes, 5 Ill.App.3d 936, 284 N.E.2d 465. However, knowledge may be established by circumstantial evidence. People v. Zazzetti, 6 Ill.App.3d 858, 286 N.E.2d 745.

In the case at bar, the evidence established that Mr. Frank Cary's car was stolen during the early morning hours of June 13, 1972. At 9:35 P.M. on June 13, 1972, defendant was observed driving the same vehicle eastbound on 76th Street when the vehicle went through a red light. Officer Felt stopped the vehicle, at which time two passengers in the car jumped out and ran. Defendant, at trial, testified that he received the car at 1:00 A.M. on June 13, 1972, from a friend by the name of Frank. Defendant did not know Frank's last name. Defendant denied that there was anybody in the car with him at the time he was stopped. However, when confronted with Officer Felt's testimony, defendant admitted that there were two passengers in the vehicle who ran when the car was stopped by Officer Felt. Where a defendant attempts to explain his conduct, he must tell a reasonable story or be judged by its improbability.



People v. Moore, 130 Ill.App.2d 266, 264 N.E.2d 582. Considering all of the evidence adduced at trial, we believe defendant's guilt has been established beyond a reasonable doubt.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FIRST DISTRICT - SECOND DIVISION  
DOWNING, J., did not participate.

PUBLISH ABSTRACT ONLY.



3D  
19 I.A. 771



No. 59103

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.	)	
	)	HONORABLE
MICHAEL McDANIEL,	)	JAMES M. BAILEY,
Defendant-Appellant.	)	JUDGE PRESIDING.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Michael McDaniel, defendant, was found guilty after a bench trial of two counts of rape, one count of deviate sexual assault, and two counts of robbery (Ill. Rev. Stat. 1971, ch. 38, pars. 11-1(a), 11-3, 18-1). He was sentenced to a term of four to twelve years on each charge, the sentences to run concurrently. Defendant appeals, arguing (1) that the trial court improperly denied the motion to quash his arrest; (2) that his identification by the complainants was insufficient to establish his guilt beyond a reasonable doubt; and (3) that the evidence was insufficient to establish beyond a reasonable doubt that the crime of rape had occurred.

At trial the following evidence was adduced. Complainant "K",<sup>1</sup> age 16, testified that on July 18, 1972, at 9:30 P.M., she was walking home from her place of employment with complainant "D" when, in the vicinity of 49th and Ashland, she observed a man standing on the corner, leaning up against a lightpost. As they walked under a railroad viaduct, the man came up behind both girls and told them to keep walking and not to turn around. The man said that if they obeyed his orders they would not get hurt. "K" testified that she turned around and looked at the man for two to three seconds. The fluorescent lights were on underneath the viaduct and the lighting conditions were good. She positively identified the

---

1/ The complainants were each 16 years of age. Rather than using full names, they will be identified by the use of the first letter of the first name, e.g., "K" and "D".



man as the defendant, Michael McDaniel. Defendant ordered both girls through the viaduct and onto the side bank by the railroad tracks. Defendant ordered both girls to squat down and demanded their money. "K" gave defendant about a dollar in change. "K" testified that, as she handed defendant the money, she looked up and could see his face. Defendant ordered both girls to lie flat on their stomachs. Defendant then put a mask on and ordered "D" to remove her blouse. "D" refused and "K" testified that she could hear a slapping and punching sound. Defendant again ordered "D" to take off her clothing and "K" could hear clothing being pulled off. Defendant then came over to "K", grabbed her blouse and ripped it off. Defendant then pulled her bra, jeans, nylons and panties off. Defendant then put his mouth on her vaginal area. Defendant then went back over to "D" and "K" testified that she could hear defendant hitting "D". Defendant then came back to "K" and forced her to have intercourse with him. Defendant then forced "K" to perform an act of fellatio. "K" testified that, when she attempted to look up, defendant punched her in the back. Defendant then went back over to "D", and "K" testified that she could hear moaning and crying. A short time later, defendant came back to "K" a third time and again forced her to have intercourse with him. Defendant then ordered her again to perform an act of fellatio and, as she complied, defendant reached a climax. During the incident, defendant spoke to both girls in Spanish and in English. Defendant then tied both girls up and left the area.

The girls managed to untie themselves and ran to a tailor shop down the street where they told the owner what had occurred. The police were called and they transported both girls to Mercy Hospital. "K" testified that she then gave the following description of the offender to the police: dark purple pants, a light purple shirt, buttondown, black hair with sideburns,



his face was not clean shaven, five feet seven to five feet nine inches tall, and 130 to 160 pounds.

On the night of the incident, she attended a lineup of five men. She viewed the lineup with only a police officer present. She identified the defendant after hearing him speak. She testified that she first recognized defendant from a distance of approximately 35 feet, when she first walked into the room to view the lineup. At this time she was not wearing her glasses. "K" testified that on some days her eyes are better than on other days, and that she wears glasses and has trouble seeing distances, but is able to see within several feet without the aid of glasses. She was not wearing glasses during the incident. "K" had to put on glasses to identify the defendant in court from a distance of twenty feet.

"D", age 16, testified that on July 18, 1972, at 9:30 P.M., she was walking from work with "K". As they walked in the vicinity of 49th and Ashland, she observed a man standing by a lamppost. They continued to walk down the street and as they entered under a viaduct, she felt something in her back and heard a man say, "Do as I say and I won't hurt you." She identified the man as the defendant, Michael McDaniel. Defendant then ordered them through the viaduct and onto the embankment by the railroad tracks. Defendant demanded their money and she gave defendant a one dollar bill. Defendant then put a mask on and ordered her to take her blouse off. She refused and defendant began to hit her. She then took her blouse off and defendant removed her bra and ordered her to lie face down on the ground. Defendant pulled her jeans, panties, and underwear down to her ankles. Defendant then went over to "K", and "D" testified that she could hear "K's" clothing being ripped off. Defendant then came back to "D", had her turn on her back, and put his penis into her mouth. Defendant then forced her to have intercourse with him. "D" testified that, as she looked up, defendant hit her in the lower back.



Defendant, after having "D" turn face down, then went back to "K" and a short time later returned to "D" for the third time. Defendant again had her turn over and forced her to have intercourse with him. He then inserted his penis into her mouth and told her to suck it. She refused and the defendant threw her back on the ground and started choking her. During the incident, defendant spoke to both girls in Spanish and in English. Defendant tied both girls together and left. The girls managed to untie themselves and ran down the street where they informed some people of what had occurred. The police were called and they transported both girls to Mercy Hospital.

"D" testified that she identified the defendant at a lineup held the evening of the incident. She stated that she was not able to identify the defendant by his face, but identified him by his voice, his general build, height, and sideburns.

Frank Cusimano, a Chicago police officer, testified that on July 18, 1972, he was working in a marked police vehicle. At 10:31 P.M. he received a flash message that an offender was wanted for a rape that had just occurred at 49th and Ashland. The offender was described as wearing dark pants, light shirt, five feet seven inches to five feet eight inches in height. At 10:35 P.M. he observed the defendant walking westbound in the area of Ashland Avenue and 52nd Street, three blocks from the scene of the rape. Defendant was wearing blue levi pants, a gray-checked plaid shirt with long sleeves, and black shoes. Defendant's pants were muddy around the knees. Defendant was placed under arrest and a search of his person revealed a one dollar bill, ten quarters, six dimes, six nickels, and seven pennies. Defendant had scratch marks on the left side of his neck and on his back.



It was stipulated that if Marianne Mohan, a micro-analyst for the Chicago Police Department, were called to testify, she would testify that she had conducted an examination of the clothes of the complainants and of the defendant. Her examination disclosed a dry stain of spermatozoa on defendant's black boxer shorts. "K's" blouse, the defendant's clothing, the money discovered on defendant's person, and a microanalysis of the clothing were admitted into evidence.

Elizabeth McDaniel, defendant's mother, testified that on July 18, 1972, the defendant was living at her home. Defendant did not speak Spanish and had tattoos on his left arm and chest.

Michael McDaniel, defendant, testified on direct examination that on July 18, 1972, he drank beer from about 4:00 P.M. to 7:30 P.M. around 45th and Paulina; that about 8:00 to 8:15 P.M. he got into a fight on the street in the area of Davis Park Square (around 43rd Street); and that he had a beer bottle with him which he used in the fight, at which time he received a bloody nose. After the fight, he went to Damen Park, after which he proceeded south on Marshfield (Avenue) to 52nd Street where he purchased two tamales when he was arrested. However, on cross-examination he testified he had been at 45th Street and Paulina, then, while on his way to 35th Street (north of 45th Street), he had a fight near 43rd Street and Wolcott, then he proceeded to 47th Street and Damen under the overpass, then back to 45th Street and talked to a Mexican girl at her home, after which he proceeded to Rudy's Tavern at 45th or 46th Street and Marshfield where he had two or three drinks, bought a quart of beer, and then proceeded on Marshfield to 52nd Street where he bought two tamales, then started toward 54th Street when he was arrested.

Defendant testified that, when arrested, he had blood on his shirt and his pants were muddy around the knees



from the fight he had been in. On cross-examination the defendant stated he knew three words of Spanish from what he read in books and heard people say; that he was a member of a club known as the Saints, consisting of about six "white dudes" and about ten Spanish people. Defendant denied robbing or raping either complainant.

Clement Robles, a Chicago police officer of Mexican extraction, in rebuttal testified that on June 2, 1972, prior to the incident in question, he was in the presence of the defendant. At that time he heard defendant curse in Spanish, using a multitude of curse words.

#### I.

Defendant contends that the trial court erred in denying the motion to quash his arrest and to suppress the lineup identification testimony stemming therefrom. A police officer may make an arrest without a warrant if he has reasonable grounds to believe that an offense has been committed and that the defendant is the man who has committed the offense (People v. Wright (1969), 42 Ill. 2d 457, 248 N.E.2d 78). Probable cause to make an arrest constitutes something less than the evidence needed for conviction. The existence of probable cause which would justify an arrest without a warrant depends upon the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, must act (People v. Colbert (1973), 10 Ill. App. 3d 758, 295 N.E.2d 225; People v. Jones (1972), 7 Ill. App. 3d 820, 288 N.E.2d 918). An officer may act on information received over a police radio. People v. Wrona (1972), 7 Ill. App. 3d 1, 286 N.E.2d 370.

In the case at bar, Chicago police officer Cusimano testified that, on July 18, 1972, at 10:31 P.M., he received a flash message over his police radio that an offender was wanted for a rape which had just been committed at 49th and Ashland. The man was described as wearing dark pants, light



shirt, five feet seven inches to five feet eight inches in height. At 10:35 P.M., only four minutes later, he observed the defendant walking westbound at Ashland Avenue and 52nd Street, three blocks from the scene of the rape. Defendant was wearing blue levi pants, a gray-checked plaid shirt with long sleeves, and black shoes. The defendant's pants were muddy around the area of the knees. Defendant now urges that this description was too vague, and that the defendant did not meet the description, since he was six feet tall. Considering all of the factors in the officer's knowledge, we conclude that there was probable cause for defendant's arrest and the trial judge correctly ruled in denying the defendant's motion to quash his arrest.

## II.

Defendant urges that his identification by the complainants was insufficient to establish his guilt beyond a reasonable doubt. The sufficiency of the identification of an accused is a question for the trier of fact, and courts of review will not reverse that decision unless the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt (People v. Catlett (1971), 48 Ill. 2d 56, 268 N.E.2d 378; People v. DeSavieu (1970), 120 Ill. App. 2d 45, 256 N.E.2d 80). An identification by one eyewitness to a crime is sufficient to justify a conviction if positive and credible, even though the defendant asserts an alibi defense. People v. Bennett (1973), 9 Ill. App. 3d 1021, 293 N.E.2d 687.

Defendant argues that the description which complainant "K" gave to the police immediately after the incident did not resemble the defendant, and that the fact that she could not identify the defendant in the courtroom from a distance of twenty feet without her glasses renders her lineup identification testimony unreliable. Precise accuracy in describing a



defendant's characteristics is unnecessary where the identification is positive (People v. Miller (1964), 30 Ill. 2d 110, 195 N.E.2d 694). The fact that "K" could not identify defendant in court from a distance of twenty feet without her glasses, yet testified that she first recognized defendant at the lineup from a distance of thirty-five feet without her glasses, was a matter of credibility for the trier of fact to determine. "K" testified that she was able to observe the defendant's face from very close proximity for two to three seconds when they were under the viaduct. She was again able to observe the defendant's face by the railroad tracks when she looked up and handed him the money he had demanded. She positively identified him in court as the man who had attacked her. This provided a sufficient basis for the trial judge to conclude that "K" had a sufficient opportunity to view the defendant so as to fix his identity (People v. Wright (1973), 10 Ill. App. 3d 1035, 295 N.E.2d 510). After a complete examination of the entire record, we cannot say that the trial judge's determination was erroneous. People v. Gaiter (1972), 8 Ill. App. 3d 784, 291 N.E.2d 172.

Defendant argues that complainant "D's" identification was completely unreliable. "D" testified that she was unable to identify the defendant at the lineup positively from his face, but identified him through his voice, his general build, and sideburns. The identification of a defendant by voice is a proper means of identification (People v. Nelson (1970), 127 Ill. App. 2d 238, 262 N.E.2d 225). The determination of the weight to be given to such evidence is a matter for the trier of fact (People v. Thompson (1950), 406 Ill. 555, 94 N.E.2d 349). Here, the trial judge, in finding the defendant guilty, noted, "I have heard the defendant here on the stand. He does have a distinctive voice." After a review of the entire record, we conclude that there was ample evidence upon which the trial



court could find that the complainants had an adequate on-the-scene opportunity to hear defendant speak and to observe the defendant, and therefore the identification of the defendant was positive and credible.

Defendant also argues that both complainants' failure to mention or describe his earring or tattoos renders his identification fatally incomplete and insufficient. The testimony of the police officer, Cusimano, established that, when arrested, the defendant was wearing a long sleeve shirt. Both complainants testified that the defendant did not remove his shirt during the incident. This readily explains the fact that neither girl observed tattoos on the defendant's body. It is also to be noted that defendant's mask could cover the earring. Further, the rule is well established that an identifying witness' failure to notice specific features of his or her attacker is not a prerequisite for identification but goes only to the weight to be given to the identification testimony. People v. Robinson (1972), 3 Ill. App. 3d 843, 279 N.E.2d 526.

Defendant argues that his alibi raises a reasonable doubt of his guilt. The trial judge is not obliged to believe a defendant's alibi testimony over the positive identification of the accused (People v. Jackson (1973), 54 Ill. 2d 143, 295 N.E.2d 462). In fact the differences between the defendant's testimony on direct examination as to his activities on the night in question as compared to his responses on cross-examination in itself could raise, for any trier of fact, a significant question as to defendant's credibility.

Here, the trial judge, who observed the demeanor of all of the witnesses during trial, found that defendant was the perpetrator of the crime charged, and where, as here, that finding is based upon sufficient evidence this court will not reverse the conviction.



In his brief and in oral argument, defendant strongly urges that People v. Carroll (1st Dist. 1970), 119 Ill. App. 2d 314, 256 N.E.2d 153 and People v. Thompson (1st Dist. 1970), 121 Ill. App. 2d 163, 257 N.E.2d 197 require reversal. We disagree. A review of each of those cases and the factual situations described in each opinion as compared to the entire record here indicates significant differences in facts so as to provide no support for the defendant.

### III.

Defendant's final contention is that the crime of rape was not proven beyond a reasonable doubt. He argues that since neither complainant made any outcry or attempt to escape during the incident, this demonstrates that the acts were committed with the consent of the victims. An outcry or attempted escape by a prosecutrix is not required where it is useless or where she is restrained by fear of violence (People v. Smith (1965), 32 Ill. 2d 88, 203 N.E.2d 879; People v. Lilly (1972), 9 Ill. App. 3d 46, 291 N.E.2d 207). Here, both complainants testified that they were abducted by the defendant as they walked down the street. Defendant put an object into "D's" back and forced both girls onto the embankment of a railroad track, where he took their money, threatened them, beat and raped them. Each complainant testified that, as she attempted to get up, defendant would beat her again. "K's" torn blouse was brought into court and introduced into evidence. In our opinion, based on our review of the entire record, we think the testimony of each of the two complainants is clear and convincing.

Under these circumstances, we conclude that the crime of rape was proven beyond a reasonable doubt. People v. Clarke (1971), 50 Ill. 2d 104, 277 N.E.2d 866.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

HAYES, P.J., and STAMOS, J., concur.

(Publish abstract only.) -10-





No. 59181

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
	)	
vs.	)	
	)	
FRANCIS BASTIEN,	)	HONORABLE
	)	GEORGE A. HIGGINS,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Francis Bastien, defendant, was found guilty after a bench trial of the offense of unlawful use of weapons in violation of section 24-1(a)(4) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a)(4)). He was sentenced to a term of 90 days in the House of Correction.

At trial, the following evidence was adduced: Joseph Stack, a Chicago police officer, testified that on October 20, 1972, in the vicinity of Wallace and 32nd Streets, he stopped the vehicle, which defendant was driving, because it did not have a City of Chicago vehicle sticker. Defendant was unable to produce a driver's license or any identification for the vehicle. Defendant stated that the car belonged to his mother. In an attempt to ascertain ownership of the vehicle, Officer Stack searched the glove compartment of the car and found a bottle containing .22 caliber shells. Thereafter, Officer Stack searched the locked trunk of the vehicle and found a .22 caliber pistol.

While defendant argues several points on appeal, for a determination of this cause it is only necessary to consider defendant's argument that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Defendant was convicted of unlawful use of weapons in violation of section 24-1(a)(4) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a)(4)), which states:



"(a) A person commits the offense of unlawful use of weapons when he knowingly:

\* \* \*

"(4) Carries concealed in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver or other firearm."

However, section 24-2(b)(4) provides certain exceptions and states:

"(b) Subsections 24-1(a)(4) and 24-1(a)(10) do not apply to or affect any of the following:

\* \* \*

"(4) Transportation of weapons broken down in a non-functioning state or not immediately accessible."

Accessibility of a weapon is not an element of unlawful use of weapons (People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E. 2d 745), but is a defense. People v. Strompolis, 2 Ill. App. 3d 289, 276 N.E. 2d 464.

In the case at bar, the uncontradicted testimony of the State established that the weapon in question was in the trunk of the vehicle being driven by the defendant when he was stopped for a minor traffic violation. The trunk was locked and in order to gain access to the weapon, defendant would have been required to stop the vehicle, walk around to the rear of the car, insert the key in the lock, and open the trunk. Under these circumstances, the gun was not immediately accessible and defendant clearly falls within the exception stated by section 24-2(b)(4) of the Criminal Code. People v. Adams, 73 Ill. App. 2d 1, 220 N.E. 2d 17.

For the foregoing reason, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

Second Division; Stamos, J., did not participate.

Publish abstract only.





30  
19 I.A. 774

No. 58596

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
RONALD HORNE,	)	HONORABLE
	)	WILLIAM F. FITZPATRICK,
Defendant-Appellant.)	)	PRESIDING.

Mr. JUSTICE McGLOON delivered the opinion of the court:

The defendant, Ronald Horne, was charged by complaint with the offense of theft. (Ill.Rev.Stat. 1971, ch.38, par. 16-1(a)(1).) After a bench trial the defendant was convicted and sentenced to 90 days imprisonment.

In this appeal the defendant presents three issues for review. We shall consider only the third issue presented by defendant, whether the State sufficiently proved that the complainant owned the allegedly stolen property, as this issue is dispositive of the case.

We reverse.

The State's case was presented through the testimony of one witness. Samuel Berry testified that he was employed by the Starlite Supermarket as a security guard on October 28, 1972. On that date he saw the defendant walk by the cash register in the store with a package of steak under his shirt. He opened defendant's shirt and saw the steak. There was a price on the package. The defendant was detained by Berry and handcuffed to a cabinet in the store. Before the police arrived the defendant broke away from the cabinet and fled the store. Approximately two weeks later Berry again saw the defendant in the store. On this occasion the defendant was detained by Berry until the police arrived and was subsequently charged by complaint with the offense of theft in that he knowingly obtained unauthorized



control over two steaks (meat) which were "the property of Starlite Supermarket".

The defendant argues here that his conviction must be reversed because the State failed to prove beyond a reasonable doubt that Starlite Supermarket did, in fact, own the allegedly stolen goods. We agree. The only identification of the allegedly stolen meat was made through the testimony of Berry. In response to the State's Attorney's question as to whether the package held by defendant had any label on them, Berry responded: "They had a price on them." Further, when asked whether they had a Starlite label on them Berry responded: "a price, yes." This was all of the evidence as to the identification of the meat.

Proof of ownership of the property allegedly stolen is an essential element of a theft prosecution in this State. (People v. Smith (1930) 341 Ill. 649, 173 N.E. 814; People v. Demos (1971) 3 Ill.App.3d 284, 278 N.E.2d 89.) The type of proof of ownership that is necessary in cases of alleged theft of unregistered, common property is best illustrated by the comparison of two cases. In People v. Gordon (1955) 5 Ill.2d 91, 125 N.E.2d 73, the defendant was accused of stealing two suits of men's clothing from a store. In affirming the defendant's conviction the court found that the proof of ownership was established on the basis of the testimony of a witness who saw the defendant take the clothes from the store rack and put them under her coat and the fact that the president of the corporation that owned the store identified the clothing taken from the defendant upon her arrest as belonging to the corporation. In People v. Wallace (1922) 303 Ill. 504, 135 N.E. 723, the defendants there, as in the instant case, were accused of stealing meat, although admittedly on a somewhat more ambitious scale. In that case



the defendants' convictions for stealing 11 hogs were reversed when the court found that there was insufficient evidence to prove beyond a reasonable doubt that the 11 hogs sold by the defendants were the same 11 hogs that the complainant alleged were missing from his farm. The only testimony produced by the State showed that the hogs the defendants sold were the same color and approximate weight as those lost by the complainant. The court found: "The record furnishes no other mark upon Littlefield's hogs by which they might be identified as the 11 hogs testified about by the Riddells." (303 Ill. at 510.)

Similarly, here there was insufficient evidence to prove beyond a reasonable doubt that the packaged steak testified about by Berry belonged to Starlite. Witness Berry merely testified that there was a price on the meat, not that there was some label or distinctive mark on the meat to identify it as being owned by Starlite.

Further, in support of our decision we would point out that there is another apparent defect in the proof in this case. Nowhere in the Report of Proceedings of the State's case-in-chief did witness Berry testify that when the defendant fled the store on October 28, 1972, he took the steak with him. During a hearing on defendant's pre-trial motion to quash his arrest witness Berry did testify that he saw the defendant flee the store with the steak, but this testimony was not adduced during the State's case-in-chief. Admittedly, Berry's prior testimony was still fresh in everyone's mind, as the hearing on the motion came immediately before the actual trial in this case. Nevertheless, there was no similar testimony during the State's case-in-chief and the defect remains.

For these reasons the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

McNamara, P.J. and Mejda, J., concur.





19 I.A. 774<sup>3D</sup>

58788

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
JAMES WOODS, )  
 )  
Defendant-Appellant. )

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
MARVIN E. ASPEN,  
Presiding.

PER CURIAM:

Defendant was found guilty, after a bench trial, of the crime of aggravated battery in violation of section 12-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-4), and sentenced to a term of one to three years.

Defendant appealed and the Public Defender of Cook County was appointed to represent him. After examining the record the Public Defender filed a motion in this court for leave to withdraw, supported by a brief pursuant to Anders v. California, 386 U.S. 738. The brief states that the only possible arguments which could be raised on appeal are:

- 1) that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt;
- 2) that the State failed to comply with defendant's motion for discovery;
- 3) that defendant's trial counsel was incompetent; and
- 4) that the trial court erred when it refused to permit defendant to testify concerning his mental state at the time of the occurrence.

On January 25, 1974, copies of the motion and brief were mailed to defendant and he was informed that he had until March 23, 1974, to file any additional points he might choose in support of his appeal. He has responded.



The first possible argument which could be made on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt because the evidence showed self-defense. The rule is well established that in a bench trial it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt will the findings of the trial court be disturbed. People v. Hampton, 44 Ill.2d 41, 253 N.E. 2d 385.

At trial, Hiawatha Austin and several other State's witnesses testified that on July 18, 1971, at approximately 1:00 A.M., the defendant and Austin had a fist fight at a party in the apartment at 741 West 51st Street, Chicago. After the fight broke up Austin started to leave. When he reached the front door defendant called him, and when Austin turned around defendant shot him in the stomach, arm and finger. As a result of the shooting, Austin was hospitalized for eight or nine days. This testimony was sufficient for the trial court to find that defendant's guilt had been established beyond a reasonable doubt even though defendant and several witnesses presented testimony to the contrary.

The second possible argument which could be made on appeal is that the State failed to comply with defendant's motion for discovery pursuant to Supreme Court Rule 412 (Ill. Rev. Stat. 1971, ch. 110A, par. 412). Prior to trial, defense counsel filed extensive pretrial motions. The record shows that when the case was called on February 4, 1972, the trial judge said, "I understand that you have had your discovery conference this morning resolving the discovery, and that we're going to set a



date for trial or other disposition of this case, by agreement." Defense counsel did not dispute the trial judge's statement. The record adequately indicates that the discovery motion of defendant was complied with.

The third possible argument which could be raised on appeal is that defendant's trial counsel was incompetent. At trial, defendant was represented by privately retained counsel. Where a defendant in a criminal case employs private counsel, his conviction will not be reversed merely because his counsel failed to exercise greater skill or may have made some tactical blunders during trial. (People v. Lenker, 6 Ill.App. 3d 335, 285 N.E. 2d 807.) A conviction will be reversed only where the representation was of such low caliber as to amount to no representation at all and was such as to reduce the trial to a farce. (People v. Travis, 10 Ill.App.3d 714, 295 N.E. 2d 325.) Here, defense counsel filed extensive pretrial motions and had obviously conferred with defendant prior to trial. Counsel's conduct during trial demonstrates that he was adequately prepared and extensively cross-examined the State's witnesses on all important issues. After a review of the entire record, we cannot say that counsel's conduct was of such low caliber as to reduce the trial to a farce.

The fourth possible argument which could be raised on appeal is that the trial court erred when it refused to permit the defendant to testify concerning his mental state at the time of the occurrence. On two occasions defendant was asked whether at the time of the shooting he feared for his safety and that of the people around him. Objections to both questions were sustained. However, defendant was later permitted



to testify that at the time of the shooting he did fear for his life and safety. Any possible error in the trial judge's two initial rulings was cured when defendant was permitted to testify as to his mental state at the time of the occurrence. People v. Dixon, 10 Ill.App. 3d 1038, 295 N.E. 2d 556.

Defendant, in his own response to this court, has argued several of the same issues argued by the Public Defender in his brief. In addition, defendant argues that he did not knowingly and understandingly waive his right to a trial by jury because his attorney informed him that a bench trial would be best, and he followed his attorney's advice. There is no specific formula for determining whether a defendant's waiver of the right to a jury trial was knowingly and understandingly entered. Each case depends upon its particular facts and circumstances. People v. Sivels, 14 Ill.App. 3d 453, 302 N.E. 2d 659.

In the case before us, the transcript shows that defense counsel informed the trial judge that it would be a bench trial. Thereafter, the defendant was carefully admonished by the trial judge that he had a right to a trial by jury. The trial judge explained the meaning of a trial by jury and the defendant stated that he understood and wished to waive a trial by jury. Defendant then voluntarily signed a jury waiver. The fact that as he now argues, he was following his attorney's advice, in no way demonstrates that the jury waiver was not knowingly and understandingly entered. The record is clear that defendant knowingly and understandingly waived his right to a trial by jury. People v. Sanders, 14 Ill.App. 3d 826, 303 N.E. 2d 552.

In his response to this court defendant also argues that "the decision to find me guilty was arranged before the trial began." Defendant does not further explain this statement, nor



has a careful review of the record revealed any evidence to support it.

We have examined the record and find that none of the arguments raised by the Public Defender or defendant has substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court is affirmed.

Motion allowed;  
Judgment affirmed.

THIRD DIVISION:

Justice Dempsey did not participate.





No. 59550

3D  
19 I.A. 779

PEOPLE OF THE STATE OF ILLINOIS, )  
Respondent-Appellee, )  
vs. )  
JOSEPH GAYNOR, )  
Petitioner-Appellant. )  
APPEAL FROM THE CIRCUIT  
COURT OF COOK COUNTY.  
HONORABLE  
ABRAHAM W. BRUSSELL,  
PRESIDING.

PER CURIAM:

Petitioner, Joseph Gaynor, appeals from the dismissal without an evidentiary hearing of his pro se post-conviction petition and a supplement thereto attacking his pleas of guilty entered on August 10, 1962, to five indictments charging unlawful sale of narcotic drugs, for which he was sentenced to not less than 15 nor more than 30 years in the Illinois State Penitentiary, each sentence to run concurrently. He contends that under the provisions of the Illinois Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch.38, par.122-6), the trial court should have held an evidentiary hearing at which he should have recused himself.

On May 19, 1972, petitioner filed a pro se petition, alleging that he had been arrested without a warrant, compelled to be a witness against himself, denied his right to an impartial jury trial, improperly indicted, excessively sentenced, and denied due process and equal protection. Apart from these conclusionary allegations, the petition also alleged that at his guilty plea: "(a) There was no plea bargaining, trial court judge stated, 15 to 30 years for a plea, or, if a jury finds him guilty it's 30 or 40 to 50 years." Consequently, his plea of guilty was not voluntary. The State moved to dismiss the petition on grounds that the allegations failed to raise any constitutional question and were mere allegations not sufficient to require a hearing, and attached as an exhibit the report of proceedings on August 10, 1962, when the defendant pleaded guilty. At the hearing on May 16, 1973, leave was given to file a supplemental petition which alleged that the trial court had



failed to properly admonish the petitioner. After reviewing the record of the proceedings of August 10, 1962, the court concluded the admonishment had been adequate and dismissed the pro se petition and the supplement without an evidentiary hearing.

Defendant argues the court should have held an evidentiary hearing at which he could testify "to discover if petitioner had any facts to support his claim of bias." Although the pro se petition was verified, the petition does not say when the trial judge made his alleged statement, to whom the statement was made, where it was made, or who else was present. It is not the court's responsibility, but the responsibility of the petitioner to attach "affidavits, records or other evidence" supporting the allegations of the petition or "state why the same are not attached." Ill.Rev.Stat. 1971, ch.38, par.122-2. In the absence of any such affidavits, and in light of the fact that no such statement by the trial court is contained in the record, the State contends that the petition did not allege sufficient facts to require an evidentiary hearing. People v. Derengowski (1970), 44 Ill.2d 476, 479, 256 N.E.2d 455.

It is significant in the case at bar that the petitioner's claim of coercion was not made until some ten years after his guilty plea and that on August 10, 1962, when his plea was accepted, the court specifically admonished him that on each of the five indictments he could be sentenced to a term of from ten years to life and that defendant expressed no surprise and made no objection when the court pronounced its sentence. Under somewhat similar circumstances in People v. Gaines (1971), 48 Ill.2d 191, 195, 268 N.E.2d 426, the court said:

"Paraphrasing the language of People v. Smith, 42 Ill.2d 547, it would seem incredible that any fact-finder would believe defendant if he now testified in support of his allegations, and his testimony would be of little, if any, value at an evidentiary hearing."

In People v. Williams (1972), 52 Ill.2d 466, 467, 288



N.E.2d 353, the petition stated:

"Persistent threats made to this petitioner by his attorney (a public defender) \*\*\* that your petitioner would be sentenced to life imprisonment should he avail himself of said right to be tried by jury \*\*\* did effectively overbear this petitioner's will with fear and thus deprived your petitioner of his 5th amendment rights to stand trial by jury of his peers for the offense of unlawful sale of narcotic drugs as charged in Indictment 67-2708."

In holding that the petitioner was not entitled to an evidentiary hearing, the Supreme Court stated (52 Ill.2d 466, 469):

"\*\*\*The allegation that the petitioner was coerced was but the statement of a conclusion. Here experienced defense counsel simply reiterated the claim of coercion when he amended the petition. It is not unreasonable to assume that could he have done so the attorney would have set out in the amended petition the factual circumstances from which coercion might have been found to establish a basis for an evidentiary hearing. No allegation as to the time, place, what was said or other circumstances of the claimed coercion was made by affidavit or otherwise."

In the case at bar, the one allegation that might have required an evidentiary hearing was the allegation that petitioner was induced to plead guilty by certain statements of the trial judge. But the allegation is not supported by an affidavit which states the time, place and circumstances of the alleged statement by the trial judge and, consequently, the allegation rested solely on the credibility of the petitioner, which, as discussed above, was of little value under the circumstances. An evidentiary hearing was not required and the petition was properly dismissed. People v. Covington (1970), 45 Ill.2d 105, 109-110, 257 N.E.2d 106.

Petitioner next contends the judge should have recused himself. But, when no motion is made by the defendant that the trial judge recuse himself, there is no abuse of discretion if the judge does not recuse himself on his own motion. (People v. Lyons (1972), 8 Ill.App.3d 647, 648-649, 291 N.E.2d 25.) The judge need recuse himself in a post-conviction matter only where he would either be a material witness or have knowledge beyond the record of the truth or falsity of petitioner's claims.



People v. Wilson (1967), 37 Ill.2d 617, 230 N.E.2d 194; People v. Hayes (1971), 49 Ill.2d 298, 302, 273 N.E.2d 838. Petitioner's contention is, consequently, without merit.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

Third Division. JUSTICE MEJDA did not participate.



59618



19 I.A. 780<sup>3D</sup>

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
KENNETH EVANS, )  
 )  
Defendant-Appellant. )

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

\_\_\_\_\_  
HONORABLE  
ARTHUR L. DUNNE,  
Presiding.

PER CURIAM:

Defendant pleaded guilty to theft by deception and attempted theft by deception as charged in two separate indictments. He was sentenced to a term of one to three years on each charge, the sentences to run concurrently. Defendant appeals, arguing that the trial court erred in failing to hold a hearing in aggravation and mitigation, and that the trial judge, in sentencing, improperly considered an incorrect criminal history sheet of defendant.

On June 13, 1973, when defendant's case was called, privately retained defense counsel—in defendant's presence—requested a pretrial conference with the court. The trial judge informed defendant that he would hold a pretrial conference with defense counsel and the Assistant State's Attorney. Defendant personally stated his approval and the conference was held. The case was then recalled and defense counsel—again in defendant's presence—stated that he had conveyed to the defendant the results of the pretrial conference at which he, the trial judge and the Assistant State's Attorney were present, and that defendant wished to enter a plea of guilty to both indictments. There is no dispute that defendant was properly admonished as to the consequences of his plea pursuant to Supreme Court Rule 402 (Ill.Rev.Stat. 1973, ch. 110A, par. 402). Defendant



was admonished by the trial judge that pursuant to the plea negotiations he would be sentenced to concurrent terms of one to three years on each charge. After stipulation by the parties, findings of guilty and judgments on the findings were entered. A presentence investigation was ordered and the case was continued for that purpose.

On July 18, 1973, the case was called for sentencing. The court specifically asked defense counsel if he was ready to proceed in aggravation and mitigation and the reply was affirmative. The trial judge then gave both counsel an opportunity to make any statements they wished. The State rested upon the previous plea negotiations and the presentence report. Defense counsel then stated that he would rely upon the fact that there had been a lengthy pretrial conference and that defendant was fully apprised of the results of the conference. The trial court addressed defendant and asked if there was anything he wished to say. Defendant replied in the negative.

Defendant's first argument is that the trial court erred in failing to conduct a hearing in aggravation and mitigation. Section 1005-4-1 of the Criminal Code (Ill.Rev.Stat. 1973, ch. 38, par. 1005-4-1), which was in effect at the time defendant entered his pleas of guilty, provides that after a determination of guilt, a hearing shall be held to impose the sentence. Here, the record does not support defendant's argument that such a hearing was not held.

In People v. Nelson, 41 Ill. 2d 364, 243 N.E. 2d 225, the defendant made an argument similar to that in the case before us. The record demonstrated that when asked, defense counsel



stated that he had no comments. The Supreme Court rejected defendant's argument that there was no hearing in aggravation and mitigation, stating at page 368:

"A hearing in mitigation and aggravation was had, defendant was given ample opportunity to be heard and his failure to take advantage of it constituted a waiver."

See also People v. McKinney, 126 Ill.App. 2d 196, 261 N.E. 2d 462; People v. Woods, 133 Ill.App. 2d 91, 273 N.E. 2d 53; People v. Winters, 1 Ill.App. 3d 533, 275 N.E. 2d 220.

In the instant case, the record reflects that there had been an extensive pretrial conference with privately retained counsel, the Assistant State's Attorney and the trial judge present, prior to the entry of defendant's pleas of guilty. After the pleas of guilty, a presentence investigation was ordered and the case was continued for that purpose. When the case was called for sentencing, the trial judge specifically announced that there was to be a hearing in aggravation and mitigation, and defense counsel stated he was ready to proceed. Defense counsel was allowed to make statements on behalf of defendant and was not hindered in any way from presenting evidence in mitigation. After defense counsel had concluded, defendant personally was asked by the trial judge if there was anything he wished to say. Defendant answered in the negative and was then sentenced. Under these circumstances, the trial judge held a proper hearing in aggravation and mitigation and defendant's failure to present further evidence constituted a waiver of that right.

Defendant's next contention on appeal is that the trial judge improperly considered an incorrect criminal history sheet of defendant attached to the presentence investigation report. Defendant urges that attached to the investigation



report there was a criminal history sheet of Luis Ardila, who was shown to have no connection with the defendant, and that "probably the report was erroneously attached and filed in this cause." Again, the record does not support defendant's argument. The presentence report on the defendant, Kenneth Evans, shows that his real name was Kenneth Martain and that he had been admitted to three years' probation on May 28, 1968, by Judge Ryan, after a conviction on the charge of theft in Case No. 68-419. Incorporated by references into the presentence investigation and attached thereto was a City of Chicago Bureau of Identification report. That report demonstrated that the defendant had used the names Luis Ardila, Robert Jordan, Robert Martain, Willie Jones, Robert William, Robert Martaine, Percy Harvey, Robert Brown, and Kenneth Evans. The report disclosed that the defendant, under the name of Luis Ardila, had been convicted of theft on May 28, 1968, before Judge Ryan in Case No. 68-419 and was admitted to three years' probation. Further, the report indicated that defendant, arrested under the name Kenneth Evans, had been indicted in grand jury indictments Nos. 72-3372 and 72-3437, the same indictments to which he had entered pleas of guilty. The record is abundantly clear that the City of Chicago Bureau of Identification record attached to the presentence report was indeed that of the defendant.

For the foregoing reasons, the judgment is affirmed.

Judgment affirmed.

THIRD DIVISION:

Presiding Justice McNamara did not participate.



3D  
19 I.A. 798



59203

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
KENNY E. WALKER,	)	HONORABLE
	)	JOHN J. CROWLEY,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

After a bench trial in the Criminal Division, defendant was found guilty of theft of property not exceeding \$150 in value (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)) and committed to the custody of the Department of Corrections of the Illinois Youth Commission to serve a six month sentence. On appeal he contends that his failure to inform the court that he was less than 17 years of age does not constitute a waiver of his right to have his cause brought before the Juvenile Division.

Defendant was found guilty beyond a reasonable doubt of a theft. He raises no issue concerning the sufficiency of that finding. After the court had sentenced him to six months in the House of Correction and set an appeal bond, it was presented with a copy of defendant's birth certificate indicating that he was 16 years old. The court then held a hearing on defendant's motion that the proceedings be declared a nullity and that he be turned over to juvenile authorities.\*

Defendant's mother, Tyler Lee Walker, did not testify at the trial but was called by the defense at the hearing. She testified

---

\* Defendant's motion is based upon the Juvenile Court Act which provides, in pertinent part, that:

"Except as provided in this Section, no boy who was under 17 years of age or girl who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of an ordinance of any political subdivision thereof." Ill. Rev. Stat. 1971, ch. 37, par. 702-7(1).



that her son was 16 years old; that on the night defendant was arrested she called the police station at which he was being held and informed the officer with whom she spoke that her son was only 16. She was told that she would have to present his birth certificate before he would be released into her custody.

A certified copy of defendant's birth certificate was introduced into evidence showing that his date of birth was March 19, 1956.

The State called Officer William Gusweiler, defendant's arresting officer. He testified that at the time of his arrest, August 7, 1972, defendant gave his age as 17. Defendant's juvenile record indicated that he had been arrested on three previous occasions that year and had at all times given his date of birth as March 19, 1955. Prior to trial Gusweiler had no indication that defendant was a juvenile.

The trial judge, citing People v. Henderson, 2 Ill. App.3d 285, 276 N.E.2d 377, found "that this court does have jurisdiction to try this offense under the circumstances" and refused to disturb the finding of guilty. However, he changed the mittimus and gave custody of defendant to the Department of Corrections of the Illinois Youth Commission.

#### Opinion

The crux of defendant's argument is that the court below erred in finding that People v. Henderson controlled its disposition of the instant case. He attempts to distinguish Henderson from the instant case on the grounds that in Henderson the defendant made the misrepresentation in court while under oath. We find no merit in this contention.

In Henderson a female defendant was found guilty of attempt robbery and sentenced to a term of imprisonment. Subsequent to sentencing the trial court learned that she was 17 years old and



not 18, as she had testified. A nunc pro tunc order correcting mittimus to the Illinois Youth Commission was entered. On appeal the defendant contended that the Criminal Division of the circuit court had no jurisdiction to hear the charge against her, that the charge should have been brought in Juvenile Division and that, therefore, reversal of her conviction was required. In rejecting this contention the appellate court noted that the defendant had "willfully misrepresented her age to the police, the State and the trial court." (Henderson at 288.) She informed the court that she was 17 only after she had been found guilty and sentenced in the Criminal Division. In the case at bar, as in Henderson, defendant "willfully misrepresented his age" to the police. Records of his previous arrests, moreover, indicated that he was 17 years old. His age was never contested at trial and, indeed, this matter was not brought to the attention of the court until after sentence had been pronounced. We therefore find that due to the voluntary misrepresentations of his age, there was no error in bringing defendant to trial in the Criminal Division. Henderson; cf. People v. Smith, 16 Ill. App.3d 100, 305 N.E.2d 714.

The judgment entered below is affirmed.

AFFIRMED.

Sullivan, P.J., and Lorenz, J., concur.

Abstract.



3D  
19 I.A. 802



NO. 59496

PEOPLE OF THE STATE OF ILLINOIS,) )  
Plaintiff-Appellee, ) )  
v. ) )  
ROBERT LUCIW, ) )  
Defendant-Appellant.) )

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY

HONORABLE  
BEN EDELSTEIN,  
PRESIDING.

\*

PER CURIAM (Fifth Division, First District):

Defendant was found guilty after a bench trial of the crime of criminal damage to property in violation of section 21-1(a) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 21-1(a).) and was sentenced to probation for a period of one year. He appeals, arguing that he did not knowingly and understandingly waive his right to a jury trial, and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

The following evidence pertinent to this appeal was adduced.

Eilene Leaders testified for the State: She lives in the first floor apartment at 3432 W. Medill, Chicago, Illinois. On March 15, 1973, at approximately 11:30 P.M., she heard noises in the gangway next to the building and heard footsteps going upstairs. Her mother, who lives upstairs, came down to her apartment and told her that there was somebody on the second floor back porch. She called the police.

Elizabeth Magdlin, the mother of Eilene Leaders, testified for the State: She lives in the second floor apartment at 3432 W. Medill; that on March 15, 1973, at approximately 11:30 P.M. she heard noises in the area of the back stairway to her apartment. She looked out onto her back porch and could see shadows. She went down to her daughter's apartment and informed her of what she had seen. After the police arrived, she inspected the lock on her back door and found that it had been "all scraped out." She last inspected her lock several days earlier, at which time the lock was not damaged.

Chicago Police Officer Muscarella testified that on March 15,

---

\* SULLIVAN, P.J., BARRETT and LORENZ, JJ., participating.



1973, at approximately 11:30 P.M., he and his partner responded to a call from 3432 W. Medill, Chicago, Illinois. They pulled into the alley behind the apartment building and observed five men running out of the gangway at 3432 W. Medill toward the alley. The five men they arrested were defendant, Robert Young, Daniel Hatter, Chuck Ford and a juvenile. The witness went to the second floor rear porch where he found a half-gallon of cleaning fluid and plastic bags. The lock on the door was pried out and there were scratches on the window. He smelled the odor of cleaning fluid on the breath of all five men. He recovered a screwdriver from Hatter and a knife from Young.

Defendant testified that on March 15, 1973, he was walking on the street when he was arrested and taken into the alley behind 3432 W. Medill. He denied that he was ever in the gangway of that address.

Robert Young testified that on March 15, 1973, he and defendant were walking on the street when he was placed under arrest. He denied that he was ever in the gangway of 3432 W. Medill or that he had a knife in his possession.

Daniel Hatter and Charles Ford testified that on March 15, 1973, at approximately 11:30 P.M., they were arrested in the alley behind 3432 W. Medill. They denied that they were ever in the gangway of that address. Hatter denied that he ever had a screwdriver in his possession.

Eilene Leaders was recalled as a witness and testified that she observed the police officers place the men under arrest in the gangway of the building at 3432 W. Medill.

Defendant's first contention on appeal is that he did not knowingly and understandingly waive his right to a trial by jury. The transcript demonstrates that prior to trial, the public defender was appointed to represent defendant and the case was passed to allow counsel to confer with his client. When the case was recalled, the



following occurred:

"THE CLERK: Robert Luciw, sir, you are charged with criminal damage to property. Are you ready for trial?

DEFENDANT LUCIW: Yes.

THE CLERK: How do you plead to the charge?

DEFENDANT LUCIW: Not guilty.

THE CLERK: To be tried by this court or by a jury?

DEFENDANT LUCIW: This court."

This court has often stated the rule that there is no specific formula for determining whether a defendant's waiver of the right to a jury trial is knowingly and understandingly entered. Each case depends upon the particular facts and circumstances of that case. (People v. Richardson, 32 Ill. 2d 497, 207 N.E.2d 453; People v. Sivels, 14 Ill. App. 3d 453, 302 N.E.2d 659.) A lengthy explanation of the consequences of a jury waiver is not a prerequisite for the validity of that waiver. People v. Geary, 8 Ill. App. 3d 633, 291 N.E.2d 13.

In the case at bar, there is nothing in the record which would indicate that defendant's jury waiver was not knowingly and understandingly entered. Defendant was represented by the public defender with whom he had conferred prior to the case being called. When asked, defendant stated without hesitation that his plea was not guilty and that he wished to be tried by the court rather than by a jury. Under these circumstances, we conclude that defendant knowingly and intelligently waived his right to a trial by jury.

Defendant's second contention on appeal is that he was not proven guilty beyond a reasonable doubt because the State's case was entirely circumstantial and did not exclude every reasonable hypothesis of innocence. It is a well established rule that the commission of an offense may be established by entirely circumstantial evidence if all of the evidence taken together satisfies the trier of fact beyond a



reasonable doubt of the accused's guilt. (People v. Marino, 44 Ill. 2d 562, 256 N.E.2d 770; People v. Bernette, 30 Ill. 2d 359, 197 N.E. 2d 436.) The fact that the circumstantial evidence relied upon must not give rise to any reasonable hypothesis of innocence does not mean that the trier of fact is required to search out potential explanations compatible with innocence and elevate them to the status of reasonable doubt. People v. Arndt, 50 Ill. 2d 390, 280 N.E. 2d 230; People v. Whitley, et al., \_\_\_\_ Ill. App. 3d \_\_\_\_, \_\_\_\_ N.E.2d \_\_\_\_, (No. 58228, decided April 9, 1974).

In People v. Rucker, 9 Ill. App. 3d 297, 292 N.E.2d 102, the defendant was convicted of criminal damage to property. The evidence adduced at trial demonstrated that after hearing glass break, a Chicago police officer observed the defendant and a second man standing in front of a National Tea store. The officer observed that the window of the store had been broken and there was a brick lying on the inside. Upon seeing the police officers, both men ran. Defendant was apprehended a short distance away. On appeal, defendant argued that the evidence was not sufficient to establish his guilt beyond a reasonable doubt because the evidence was entirely circumstantial and did not exclude every reasonable hypothesis of innocence. In rejecting defendant's contention, this court said:

"Upon a careful consideration of all of the evidence, we are satisfied that the evidence was sufficient to prove the defendants guilty of criminal damage to property beyond a reasonable doubt."

In the case at bar, the testimony of Elizabeth Magdlin established that on March 15, 1973, at 11:30 P.M., she heard noises and saw shadows on her second floor back porch. She immediately went to her daughter's apartment and the police were called. Officer Muscarella testified that he arrived upon the scene and apprehended the defendant and four other men as they were running out of the gangway of Magdlin's



building. On the second floor back porch, Officer Muscarella found a container of cleaning fluid and several plastic bags. Officer Muscarella testified that he smelled cleaning fluid on the defendant's breath. The lock to Magdlin's door had been pried out and there were scratches on the window. A screwdriver and a knife were found on two of the men. Defendant's testimony that he was not in the gangway was directly contradicted by the testimony of Officer Muscarella. In a bench trial, credibility of witnesses is for the trial judge to determine. (People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363.) After a careful consideration of all of the evidence adduced at trial, we are satisfied that the evidence was sufficient to establish defendant's guilt on the charge of criminal damage to property beyond a reasonable doubt.

The judgment of the circuit court is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]





NO. 59558

PEOPLE OF THE STATE OF ILLINOIS,)  
 )  
 Plaintiff-Appellee, )  
 )  
 v. )  
 )  
 JEROME REESE, )  
 )  
 Defendant-Appellant.)

APPEAL FROM THE  
 CIRCUIT COURT OF  
 COOK COUNTY

HONORABLE  
 EARL E. STRAYHORN,  
 PRESIDING.

\*  
 PER CURIAM (Fifth Division, First District):

Defendant was found guilty after a bench trial of the crime of burglary in violation of section 19-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 19-1.) and sentenced to a term of from three to nine years. On appeal his sole contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

The following evidence pertinent to this appeal was adduced at trial.

Chicago Police Officer Donald Woody testified for the State. On February 12, 1972, at approximately 8:50 p.m., he and his partner, Officer Kolovitz, were stopped by a man from the Breakers Motel who came up to their squad car. After a conversation with that man, he proceeded to room 206 in the Breakers Motel. The door was half open and the lights were off. He entered the room and found the defendant standing behind the door. The television set had been pulled from the wall and was sitting on a bed near the door. There was no evidence of any forcible entry into the room. Woody on cross-examination further testified that the defendant when arrested stated the man who had rented the room had given him permission to be in the room.

Rubin Feinberg testified for the State. The Breakers Motel at 3126 E. 79th Street, Chicago, Illinois, is owned by a corporation. He owns the stock in the corporation and acts as its business manager and

---

\* SULLIVAN, P.J., BARRETT and LORENZ, JJ., participating.



controller. In the late evening of February 12, 1972, he proceeded to room 206 in the motel and found the television set in the room with the alarm wires disconnected. He personally reviewed the desk records of the motel and determined that the defendant was not a guest in the motel on that evening. A defense objection on the basis that this testimony was hearsay in violation of the best evidence rule was overruled. Neither he nor any of his agents in his employ gave the defendant permission to enter room 206 of the motel on February 12, 1972; that on the evening in question, room 206 was not rented. Defendant did not object to this testimony.

Defendant's only contention on appeal is that the evidence failed to prove beyond a reasonable doubt that he entered the motel room without authority. Defendant reasons that Feinberg's testimony that he personally determined from the desk records of the motel that defendant was not a registered guest in the motel that evening was both hearsay and in violation of the best evidence rule. We have noted that at trial defense counsel brought out similar evidence when, during the cross-examination of Officer Woody, defendant admitted when arrested he had not rented room 206, but stated that the person who had rented the room had given him permission to be in the room.

Even if defendant's argument was accepted, the evidence was still sufficient to establish defendant's guilt beyond a reasonable doubt. Defendant was charged with the crime of burglary in violation of section 19-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 19-1.), which states:

"A person commits burglary when without authority he knowingly enters or without authority remains within a building, \*\*\* or any part thereof, with intent to commit therein a felony or theft."

To establish defendant's guilt under this statute, it was necessary for the State to prove that defendant entered room 206 of the Breakers Motel without authority and with the intent to commit a felony or a theft. At trial, Feinberg testified that he is the owner of the Breakers Motel.



Further, he testified without any objection by defense counsel that on February 12, 1972, the defendant did not have permission to enter room 206 of that motel. Officer Woody's testimony established that on February 12, 1972, at approximately 8:50 p.m., defendant was found in room 206 of the Breakers Motel, hiding behind the door with the lights in the room turned off. A television set had been disconnected from the wall and was sitting on the bed near the door. This evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant relies upon People v. Poindexter, \_\_\_ Ill. App. 3d \_\_\_, 305 N.E.2d 400, where this court reversed defendant's conviction for theft on the basis there was insufficient evidence of ownership. The only testimony regarding ownership was that of the manager of the company who testified that the serial numbers on the typewriters recovered from defendant matched those on the bill of sale he had seen at his office. This court held that the manager's testimony was inadmissible and there was insufficient evidence of ownership. In the case at bar, ownership of the motel was unchallenged and there was sufficient testimony by Feinberg, apart from the alleged hearsay testimony, regarding his examination of the records of the motel that defendant did not have authority to enter room 206 of the motel.

The judgment is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]





58258

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
JAY JONES, JR.,	)	HON. PHILIP ROMITI,
	)	Presiding.
Defendant-Appellant.	)	

\*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Jay Jones, Jr., defendant, was found guilty after a jury trial of attempt murder, rape and two counts of aggravated battery (Ill. Rev. Stat. 1971, ch. 38, par. 8-4, 11-1 and 12-4.) He was sentenced to 10 to 20 years for attempt murder and 25 to 50 years for rape, the sentences to run concurrently. Defendant appeals arguing (1) the evidence was insufficient to establish his guilt of rape beyond a reasonable doubt; (2) the Illinois Rape Statute is unconstitutional in that it discriminates against males in violation of the equal protection clause of the fourteenth amendment and article I, sec. 18 of the Illinois constitution of 1970; and (3) his sentence of 25 to 50 years on the charge of rape is excessive.

At trial, Marjorie Paden testified that on January 23, 1972, at approximately 2:15 A. M., she was returning home from a friend's house and stopped to get gas at the Clark gas station at Route 30 and Lexington Street. Defendant opened the passenger door to her vehicle and asked if she would drop him off at a friend's house. Mrs. Paden agreed and they left the gas station proceeding down Route 30. After going approximately four blocks, defendant pulled a knife, put it to Mrs. Paden's neck and told her to do exactly what he said. Defendant directed her to a small community called Sunnyfield and into the driveway of a home. Then he held her with his left hand and with the knife in his right hand, forced her into the home. Mrs. Paden testified

\*Mr. Justice Hallett did not participate.



that she entered the house through a side door and into the kitchen. She then entered a hallway which led to a room with children's clothes in it. To the left of the hallway was a living room and to the right was a bedroom. Defendant forced her into the bedroom and ordered her to remove all of her clothing. She complied and defendant then removed his pants. Defendant then ordered her to come over where he was standing. When she failed to comply, defendant grabbed her arm, pushed her down on the bed and slapped her. Defendant put the knife up against her throat and forced her to have intercourse with him.

Defendant then ordered her to get dressed and took her out of the home and into the car. Defendant took the car keys out of her purse and drove down Cottage Grove Avenue. After several blocks, defendant pulled the car off to the side of the road. There, he tied Mrs. Paden's hands behind her back and told her that he was going to kill her. Defendant ordered her out of the car, threw her to the ground and stabbed her three times in the neck. Defendant got back into the car and drove off. Mrs. Paden testified that she attempted to flag down a car but none would stop. She then cut across a field and went to a factory where she saw several men and hollered for help. The police were called and Mrs. Paden told them that someone had tried to kill her. The police took her to St. James Hospital where she remained for four days.

Mrs. Paden testified that at St. James Hospital, she was interviewed by Officer Nance and she told him that she had been raped and stabbed. She described the man who had attacked her as a male Negro, 33 years old, five feet seven inches to five feet eight inches in height, of stocky build. He had a "black natural" and sideburns. She also gave Officer Nance a description of the house she was taken to and the route used to get there.



Mrs. Paden further testified that on January 28, 1972, together with Officer Nance, she went to the community of Sunnyfield where she identified the house into which her attacker had taken her. Officer Nance then took her back to the East Chicago Heights Police Department where she viewed over 100 photographs and identified a photograph of the defendant as her attacker. On January 29, 1972, Mrs. Paden was taken into a room at the East Chicago Heights Police Department where she viewed four men and identified the defendant as her attacker.

Ed Morissette, a police officer for the Village of Chicago Heights, testified that on January 23, 1972, pursuant to a call, he proceeded to the Stauffer Chemical Company at 10th and State Street, Chicago Heights, Illinois. There he observed Mrs. Paden who was sitting on the ground, soaking wet and bleeding from her neck. He took Mrs. Paden to St. James Hospital for medical treatment. The East Chicago Heights Police Department was contacted and he had no further connection with the case.

George Nance, an investigator for the East Chicago Heights Police Department, testified that on January 23, 1972, pursuant to an assignment, he went to St. James Hospital to interview Mrs. Paden. Mrs. Paden had bandages on her neck and chest. Mrs. Paden gave him a description of the offender and told him what had occurred and told him where the offense had taken place. Investigator Nance testified that on January 28, 1972, he took Mrs. Paden to the community of Sunnyfield where she identified the house into which her attacker had taken her. Mrs. Paden viewed over 100 photographs at the East Chicago Heights Police Station and identified a photograph of the defendant as her attacker. Investigator Nance testified that on January 29, 1972, he had occasion to proceed to the house that Mrs. Paden had identified where he spoke with Dorothy Jones. He entered the



house by means of a side door which led into a kitchen. Off the kitchen there was a hallway with a living room to the left of it and a bedroom at the end of the hallway with kids' stuff in it. Investigator Nance testified that on January 29, 1972, he placed the defendant under arrest.

Ezell Springfield testified that on January 23, 1972, he was employed at the Stauffer Chemical Company, Chicago Heights, Illinois. In the early morning hours, he observed Mrs. Paden walking toward the plant and hollering for help. Mrs. Paden was covered with blood. The Chicago Heights police were called and arrived shortly thereafter.

Dr. D. Louis Cervera testified that he examined Marjorie Paden at St. James Hospital in the early morning hours of January 23, 1972. Mrs. Paden had lacerations of the neck and was in a highly emotional state. Dr. Cervera testified that in his opinion the lacerations to Mrs. Paden's neck were caused by an attack.

Jay Jones, Jr., defendant, testified that on the evening of January 22, 1972, and in the early morning hours of January 23, 1972, he was at a tavern on Route 30 in East Chicago Heights, Illinois. He arrived at the tavern at 11:00 P. M. and left at 2:00 A. M. when he proceeded to his home four blocks away. He denied that he saw Mrs. Paden at any time on January 22 or 23. Defendant testified that he was employed by the Hall Aluminum Company, Chicago Heights, Illinois.

Marian Levy testified in rebuttal that she is in charge of the personnel payroll department for the Hall Aluminum Company, Chicago Heights, Illinois. On January 22, 1972, the defendant was not employed by that company. Mrs. Levy testified that the Hall Aluminum Company did have a James Johnson working for them and Mr. Johnson listed the same home address as the defendant.



Defendant's first contention on appeal is that the evidence is insufficient to establish his guilt beyond a reasonable doubt on the charge of rape. In rape cases, courts of review are charged with a special duty to carefully examine the evidence. (People v. Qualls, 21 Ill. 2d 252, 171 N.E.2d 612.) However, in such an examination courts of review must be careful not to encroach upon the function of the trier of fact to weigh credibility and otherwise assess the evidence presented at trial. (People v. Springs, 51 Ill. 2d 418, 283 N.E.2d 225.) The testimony of a complaining witness alone, if positive and credible, is sufficient to sustain a conviction even though contradicted by the accused. People v. Lilly, 9 Ill. App. 3d 46, 291 N.E.2d 207.

In the case at bar, the testimony of Marjorie Paden was positive and credible. She testified that on January 23, 1972, at approximately 2:15 A. M. she was getting gas at the Clark gas station when the defendant asked her for a ride. She agreed and after driving several blocks defendant pulled a knife and forced her to a home in the community of Sunnyfield. There, the defendant, holding a knife to her throat, raped her. Defendant then took her to an area off of Cottage Grove where he stopped her car. Defendant tied her hands behind her back and told her that he was going to kill her. Defendant removed her from the car and stabbed her in the neck three times. Defendant then drove off. Mrs. Paden ran to a nearby factory for help. The police were called and Mrs. Paden was taken to St. James Hospital for medical treatment.

Defendant urges that Mrs. Paden's failure to promptly report the rape cast doubt upon her credibility. Defendant urges that Mrs. Paden could have reported the incident to Mr. Springfield, Officer Morissette or Dr. Cervera. Mrs. Paden's failure to inform Mr. Springfield and Officer Morissette of what had occurred was understandable since she had just walked through a



field and had been stabbed three times in the neck. Officer Morissette's only involvement was to take Mrs. Paden to the hospital and to call the East Chicago Heights police since the crime occurred in their district. Similarly, Mrs. Paden's failure to inform Dr. Cervera that she had been raped was understandable since according to Dr. Cervera's testimony she was in a highly emotional state and was suffering from three stab wounds in the neck. The first time Mrs. Paden was interviewed in detail was by Investigator Nance. At that time Mrs. Paden told him that she had been raped and robbed, gave a detailed description of the offender and a detailed description of how the offense had taken place and a detailed description of the house in which it had occurred. On January 28, 1972, she accompanied Investigator Nance to the community of Sunnyfield and identified the house where the incident had taken place. The same day she viewed over 100 photographs and positively identified defendant as the man who had attacked her.

Failure of the prosecution to produce medical testimony was not significant. "[M]edical testimony is not required to prove a rape, and this is true even when it is established that the victim went to a hospital after the crime occurred." People v. Reese, 54 Ill. 2d 51, 58, 59, 294 N.E.2d 288 citing People v. Boney, 38 Ill. 2d 23, 24, 230 N.E.2d 167.

Defendant also urges that, although Mrs. Paden claimed not to have known him previously, his name "Jay Jones, Jr." appeared on a report prepared by a police officer who had interviewed her the morning after the offense. But, the record shows only that the officer was asked if the defendant's name appeared "anywhere on that report" and he responded affirmatively. This is speculative and meaningless as we do not know the date of preparation of the report and we cannot, on the basis of this one question, negative the possibility that defendant's name may have appeared



on the margin of the report or elsewhere thereon by way of a later addition. Also, defendant did not testify that he ever knew Mrs. Paden before.

After seeing and hearing all the witnesses, the jury found that defendant's guilt had been established beyond a reasonable doubt. We cannot say that "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." (People v. Clark, 52 Ill. 2d 374, 387, 288 N.E.2d 363.) See also People v. Reese, 54 Ill. 2d 51, 57, 58, 294 N.E.2d 288.

Defendant's second contention on appeal is that the Illinois Rape Statute is unconstitutional in that it discriminates against males in violation of the equal protection clause of the fourteenth amendment and article I, sec. 18 of the Illinois constitution of 1970. In his brief and reply brief, defendant concedes that this issue was not raised in the trial court but argues that since the statute was unconstitutional the indictment predicated upon the unconstitutional statute is void.

In People v. Reese, 14 Ill. App. 3d 1049, 303 N.E.2d 814, the defendant was convicted of rape. On appeal, defendant sought to argue that the rape statute was unconstitutional in that it discriminates against males. The defendant did not raise this argument in the trial court. In rejecting defendant's contention, this court said (14 Ill. App. 3d at 1055):

"Concerning the question of the constitutionality of the applicable statute, we have examined the entire record and find this issue was not raised in the trial court and is being raised here for the first time. Since this is the first point at which the constitutionality issue has been raised, we will not consider the question here. People v. Amerman, 50 Ill. 2d 196, 279 N.E.2d 353, People v. Eubank, 46 Ill. 2d 283, 263 N.E. 2d 869."

In the case at bar, as in Reese, the defendant did not raise the constitutionality of the Illinois Rape Statute in the trial



court. Therefore, he may not raise the argument for the first time on appeal. Defendant's reliance upon People v. Sarelli, 55 Ill. 2d 169, 302 N.E.2d 317 is not persuasive. There, in post-conviction proceedings, the Supreme Court permitted a defendant to raise the issue of constitutionality of the Narcotics Control Act, not done in the trial court, because the statute had previously been held unconstitutional in People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407.

Defendant's final contention is that the sentence of 25 to 50 years for rape is excessive and should be reduced. While this court has the power to reduce sentences (Ill. Rev. Stat. 1971, ch. 110A, par. 615(b)(4)) the Supreme Court has indicated that this power should be exercised with considerable caution and circumspection since the trial judge has a superior opportunity during the course of the trial and during the hearing in aggravation and mitigation to determine the proper sentence than do courts of review. (People v. Taylor, 33 Ill. 2d 417, 211 N.E. 2d 673; People v. Keene, 1 Ill. App. 3d 720, 274 N.E.2d 130.) In the case at bar, the evidence adduced at trial demonstrates that the defendant committed a vicious rape during which he stabbed the complaining witness three times after tying her hands behind her back. After a complete review of the entire record, we conclude that the sentence is not excessive.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Abstract Only)





59398

PEOPLE OF THE STATE OF ILLINOIS, )	
)	APPEAL FROM THE
Respondent-Appellee, )	CIRCUIT COURT OF
)	COOK COUNTY
vs. )	
)	HON. ROBERT J. DOWNING,
HERMAN LOCKETT, )	Presiding
)	
Petitioner-Appellant. )	

\* PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Petitioner, Herman Lockett, appeals from the denial, without an evidentiary hearing, on April 25, 1973, of his petition filed under the provisions of the Illinois Post-Conviction Hearing Act. (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.) Petitioner does not dispute the correctness of the court's order of dismissal, but argues that his appointed counsel was inadequate under Supreme Court Rule 651(c) because he did not attempt to amend the pro se petition "to conform to the statutory requirements." Ill. Rev. Stat. 1971, ch. 110A, par. 651(c).

Petitioner's original pro se petition filed July 8, 1971, contained 18 allegations of alleged deprivation of constitutional right and on July 28, 1971, petitioner filed a petition for leave to file an amendment to the original petition, adding another 12 allegations. A number of these contentions were raised and decided adversely to the petitioner on his direct appeal to this court. (People v. Lockett, 6 Ill. App. 3d 867, 286 N.E.2d 809.) Among these were issues concerning the prosecution's argument to the jury, accomplice's testimony, whether guilt was proven beyond a reasonable doubt and whether the sentence of 60 to 100 years upon petitioner's conviction for murder and armed robbery was

\* HALLETT, J. did not participate



excessive. Several of petitioner's other contentions, for example, that his original trial counsel was incompetent, complaining of the admission of certain physical evidence, questioning the validity of the indictment, were not decided by the court on direct appeal. However, no reason is contained in the pro se petition as to why these issues were not raised on direct appeal. Some of the allegations are repetitive and the only allegation that may be said to be outside the record is petitioner's claim that he was denied the right to subpoena witnesses. However, the petition for amendment specified that the witnesses petitioner felt should have been called were co-defendants, James Williams and Andrew Prim, and that trial counsel did not subpoena these witnesses because of his belief that their testimony would only "hurt" the defense.

The State moved to dismiss the pro se petition because the allegations raised no constitutional question, were bare allegations not sufficient to require a hearing and because the petitioner's conviction was pending on direct appeal and the doctrine of res judicata applied. On April 6, 1973, a certificate pursuant to Supreme Court Rule 651(c) was filed by an assistant public defender, stating he had consulted with the petitioner by mail on numerous occasions, and personally visited him in the Illinois State Penitentiary on May 1, 1972, that he had examined the record of the proceedings at trial and thoroughly studied the pro se petition which, he felt, "fully and adequately" presented all possible claims subject to relief under the Illinois Post-Conviction Hearing Act and, consequently, that he felt it unnecessary "to amend or change" the pro se petition.



At the hearing on the petition on April 25, 1973, another public defender appeared who also asserted that he had read the transcript and knew that the conviction had been affirmed on direct appeal and that it appeared to him that the issues in the pro se petition amounted to a claim that petitioner's trial attorney was incompetent. The case was passed so the trial judge could get his notes and review the appellate court opinion. When the hearing was resumed, the judge indicated he had reviewed the appellate court opinion and his own notes and he then dismissed the petition without an evidentiary hearing.

Petitioner relies entirely on the case of People v. Gonzales, 14 Ill. App. 3d 535, 302 N.E.2d 718 (abstract), which reversed the trial court's dismissal of a post-conviction petition solely on the ground that appointed counsel was inadequate because he did not amend the pro se petition to set forth the factual basis upon which the conclusions in the pro se petition were based. The court stated that it was the duty of counsel appointed in post-conviction proceedings to consult with his client and to put any pro se petition filed into "proper legal form alleging facts and not conclusions," and continued (slip opinion, pages 3-4):

"Clearly, petitioner's allegation that he was denied a trial through the trickery of his court-appointed counsel could have, at a minimum, been amended to set out what petitioner claimed was said by counsel, when it was said, where it was said and who was present. Likewise, petitioner's allegation that he was forced into pleading guilty due to the fear caused by the threats of the prosecutor could have been amended to state specifically petitioner's claims as to what threats were made, when they were made, to whom they were made, where they were made, and who was present."



The facts in the case at bar are different in several respects from those in Gonzales. In that case a guilty plea and not a jury trial was the basis of the underlying conviction being attacked. Both allegations the court mentioned as susceptible to amendment by appointed counsel were beyond the record. In the case at bar, the only allegation beyond the record is petitioner's claim he was denied the right to subpoena witnesses. Regarding this claim, the pro se petition fully sets forth the factual basis for this claim - trial counsel's judgment that calling the two co-defendants would "only hurt" defendant's case. It is well settled that legal representation given an accused will not be deemed inadequate unless the defendant demonstrates actual incompetence of counsel as reflected by the manner of carrying out his duties as a trial attorney and that substantial prejudice has resulted without which the outcome would "probably have been different." (People v. Gill, 54 Ill. 2d 357, 363-364, 297 N.E.2d 135.) In the case of this particular allegation in the pro se petition, enough facts were set out so that amendment was not necessary. It is obvious from the facts alleged in the petition recited above that the two co-defendants were not called as a matter of trial strategy. Matters going to the exercise of judgment and discretion in trial tactics are insufficient to establish the incompetence of counsel. People v. Gill, 54 Ill. 2d 357, 364, 297 N.E.2d 135.

Nevertheless, appellate counsel contends that the pro se petition's allegations concerning incompetent counsel and denial of the right to confront and cross-examine witnesses could have been amended to "set forth the claimed violations in a legally sufficient manner." It is true that under People v. Slaughter,



39 Ill. 2d 278, 235 N.E.2d 566, counsel must amend the petition as "necessary for an adequate presentation of petitioner's contentions." However, when, as here, there has been a trial and the case has been decided on direct appeal, and when no allegations outside the record are contained in the pro se petition, the question must become, as recently stated in People v. Wollenberg, 9 Ill. App. 3d 1028, 1030, 293 N.E.2d 728: "Amend it to say what?" The failure of counsel in a post-conviction matter to amend the pro se petition is not, of itself, reversible error: "There must be a showing that the petition could be amended to state a case on which post-conviction relief can be granted." (People v. Goodwin, 5 Ill. App. 3d 1091, 1093, 284 N.E.2d 430.)

In the case at bar, there does not appear to be "any reason to believe the petition could have been successfully amended." (People v. Smith, 40 Ill. 2d 562, 564, 241 N.E.2d 413.) Each of the petitioner's allegations was either decided against him on his direct appeal or waived because he did not present these contentions to the court on the direct appeal (see People v. Price, 44 Ill. 2d 332, 333, 255 N.E.2d 395), with the possible exception of his counsel's failure to call the two witnesses which, as we have seen, was adequately alleged but did not raise any constitutional issue. The Supreme Court has stated that where "there is not a showing that sufficient facts or evidence exist, inadequate representation certainly will not be found because of an attorney's failure to amend a petition ..." (People v. Stovall, 47 Ill. 2d 42, 46, 264 N.E.2d 174.) This was not a petition that could be amended to avoid the legal defects which petitioner admits warranted its dismissal. Since the petitioner was afforded effective assistance of counsel in the post-conviction matter, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED



3D  
19 I.A. 856

72-350

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
JUN 5 - 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



NO. 72-350

Abstract

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

JUN 5 - 1974

LOREN J. STREIT, Clerk Pro Tem  
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the
	)	Circuit Court of the
	)	18th Judicial Circuit,
RICHARD F. LAWLER,	)	DuPage County, Illinois
Defendant-Appellant.	)	
	)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant appeals from a conviction for speeding. He contends that the judgment should be reversed because (1) the State failed to prove the existence of the local ordinance altering the statutory speed limit, and (2) the trial court could not take judicial notice of the local ordinance since it was not presented to the court, and because there was some doubt as to the existence and validity of such ordinance.

The only testimony offered at trial was that of the arresting officer. On March 30, 1972, at approximately 9:00 P.M., Officer Pocius was operating a radar unit on Lambert Road near Harding Road in Glen Ellyn, Illinois. The posted speed limit on this portion of Lambert Road is 35 miles per hour. The immediate area is rural in nature, sparsely settled and undeveloped. The radar unit registered the defendant's speed at 55 miles per hour. On cross-examination, the officer testified that he "had no knowledge of any ordinance reducing the speed in this area from 65 miles per hour to



35 miles per hour." After the officer completed his testimony the State rested its case. The defendant then moved for a finding of not guilty on the ground that the State failed to prove the existence of the ordinance altering the speed limit from 65 to 35 miles per hour. The court denied defendant's motion. The defense rested without introducing any evidence and defendant was found guilty.

The threshold issue is whether the State was required to introduce the local ordinance into evidence in order to establish a legal speed limit lower than that permitted under the state statute. The defendant, without the benefit of case law, takes the position that the State must introduce the local ordinance altering the statutory speed limit before he can be found guilty of speeding beyond a reasonable doubt. The State's position is that unless the existence or validity of the local ordinance is raised by the defendant as an affirmative defense, the State is not required to prove the existence or validity of any local ordinance.

Under Section 11-601 (d) of the Illinois Vehicle Code (Ill. Rev. Stat. 1971, ch. 95-1/2, sec. 11-601 (d)), the speed limit at the scene of the offense is 65 miles per hour unless another speed restriction has been established in accordance with the Illinois vehicle code. Under section 11-604 of the Code (Ill. Rev. Stat. 1971, ch. 95-1/2, sec. 11-604), a city, by ordinance may, within certain specified limitations, determine and declare a maximum speed limit which differs from that established by statute. After such ordinance is enacted into law, the altered maximum speed limit becomes effective "\*\*\*when appropriate signs giving notice of the limit are erected at the proper place or along the proper part or zone of the highway or street."

In instances where the State proves that a defendant was driving in excess of the posted limit, a rebuttable presumption is raised that the defendant has violated a properly enacted speed limit ordinance. This presumption is sufficient to establish a prima facie case.



(People v. Perlman, 15 Ill. App. 2d 239, 244-45 (1957).) If the defendant offers no evidence to rebut the presumption, the prima facie case becomes conclusive and justifies a finding of guilty. People v. Lloyd, 178 Ill. App. 66, 70 (1913).

In the instant case the only evidence that could possibly be considered as rebutting the presumption would be the negative answer of the police officer when asked during cross-examination if he had knowledge of any ordinance reducing the speed limit. We find this to be insufficient to overcome the presumption that a valid ordinance existed establishing the maximum speed limit at 35 miles per hour.

In reaching this conclusion, it is unnecessary to answer defendant's other issues.

Judgment affirmed.

GUILD, P.J. and SEIDENFELD, J., concur.



3D  
19 I.A. 860

72-332

UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )   ss.  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L. L. RECHENMACHER, Justice  
                 LOREN J. STROTZ     , Clerk  
                 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit:   On

**JUN 4 - 1974**

the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures  
following, viz:



FILED

JUN 4 - 1971

JOSEPH STAFFZ, Clerk pro tem  
Appellate Court, 2nd District  
**Abstract**

No. 72 332

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the Circuit Court
	)	for the 17th Judicial Circuit,
WATSON ALFRED GRAY,	)	Winnebago County, Illinois.
	)	
Defendant-Appellant.	)	

---

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant appeals his conviction for armed robbery in a jury trial and his sentence of not less than 5 nor more than 12 years.

The principal issue raised by defendant is the admissibility of (a) a Firearms Transaction Record form signed by defendant, (b) a check with stub attached issued by defendant to K-Mart indicating that the check had been returned unpaid for "insufficient funds", and (c) alleged statements made by defendant to certain police officers (constituting an oral confession) and testimony that defendant later refused to sign that oral confession after it was reduced to writing. Defendant also contends that he was not proved guilty beyond a reasonable doubt; that the trial court erred in denying his motion for a new trial based on "newly discovered evidence", and that the sentence was excessive.

At about 2:30 a. m. October 12, 1971, defendant and one Gary Hall entered the lobby of the Albert Pick Motel in Rockford and defendant requested a room with two beds. As Mrs. Haack, the night



clerk, was filling out the registration card she heard the defendant tell Mr. Hall to go out and get the luggage. At this time Hall came forward with a gun pointed toward Mrs. Haack and said "this is a stick-up." Defendant then took her to the back office, put her in a chair, and taped her ankles and her wrists with masking tape and put tape over her mouth. He then took the money from the cash drawer (\$93.20 according to Mrs. Haack) and defendant and Hall left the motel and drove away. Mrs. Haack was able to release herself and notified the police. The police spotted the car and after a high speed chase through Rockford, lasting about ten minutes at speeds up to more than 120 miles per hour, Mr. Hall, the driver, lost control while rounding a curve, damaging the car which slowed it down, and he finally brought the car to a stop. Both men were arrested and taken to the police station. Defendant at this time had on his person \$93.46. The police recovered from the automobile a .32 caliber revolver fully loaded and a .25 caliber automatic, a paper bag containing two partially filled boxes of .25 and .32 caliber shells and a partially used roll of masking tape.

Mr. Gordon Solem, manager of the Sporting Goods Department of K-Mart in Janesville, Wisconsin, testified for the State that at the supper hour on October 11 defendant came in and purchased a .25 caliber pistol and a box of .25 and a box of .32 caliber shells. He further testified that on a "Firearms Transaction Record" (Federal "Form 4473" for intrastate over-the-counter transactions) defendant filled in blanks following questions 8 (a) through 8 (h) with the words "no" and signed the document. Mr. Solem explained that if any of the blanks were



answered "yes" the firearm could not be sold. Defendant's counsel did not object to the testimony regarding the form but did object to its offer into evidence. Mr. Solem also identified the automatic pistol recovered by the police from the automobile as the same one he had sold to the defendant.

Mr. Solem further testified defendant wrote a personal check in the sum of \$45.63 payable to K-Mart for his purchases. When the check was offered in evidence defendant's counsel objected, not to the admission of the check itself but to the yellow stub attached thereto, which indicated the check was returned unpaid by the drawee bank for "insufficient funds". The trial court admitted both the Form 4473 and the check with stub attached into evidence, over defendant's objection.

Defendant contends that it was error to admit Form 4473 because it would constitute evidence of a crime with which defendant was not charged; he points to the fact that defendant had previously been convicted of a felony and one of the questions on the form signed by him and which was answered "no" was, "Have you been convicted in any court of a crime punishable by imprisonment for a term not exceeding one year?". And, the form contained a statement of the signer's understanding "that the making of any false oral or written statement \* \* \* is a crime punishable as a felony."

When Form 4473 was offered and received in evidence there had been no evidence tending to show it contained a false statement by defendant. It was not until defendant testified in his own defense that he answered, in response to a question from his counsel, that in 1966 he had



pleaded guilty to a charge of rape and aggravated kidnapping and was sentenced to a term of three to six years. Thus it was his own testimony which was the only evidence from which the jury could deduce that defendant might be subject to prosecution for a felony under Federal law for a false statement on Form 4473.

Defendant contends the admission in evidence of the stub attached to the check was erroneous because it constitutes "evidence of a criminal charge which has not been in issue." Here the fact that defendant had purchased a gun was relevant to show defendant's criminal intent and the admission into evidence of the check used to purchase the gun was proper. The incidental fact that the check had a yellow "N.S.F." sticker attached to it which could indicate an incidental separate offense does not amount to reversible error. (See People v. Ostrand (1966), 35 Ill. 2d 520, 530.) When the State introduced the check and Form 4473 in evidence it obviously did so to show defendant's criminal intent, and the prosecution would be unaware defendant would admit the purchase of the firearm and the .25 and .32 caliber shells. Therefore, both exhibits were properly offered and received in evidence.

At the trial, two police officers, Krebs and Gessner, testified in substance that they arrived at the police station about 4:30 to 4:45 a. m. on October 12, 1971, to interrogate the defendant. Defendant was advised of and stated he understood his Miranda rights and he signed the rights' waiver form at 5:00 a. m. after the form had been read to him. Defendant then expressed a desire to talk to his wife and to talk to his attorney. He was allowed to and did call his lawyer, a Mr. Joseph Kuemmel of Belleville,



Wisconsin, and his wife in Whitewater, Wisconsin. After the call defendant told the officers his lawyer instructed him to cooperate with the police and said he would give a statement, which they testified he proceeded to do. Defendant's counsel made a continuing objection to any testimony as to defendant's statement. In defendant's oral statement which was later summarized by Officer Krebs and typed up, defendant related the sequence of events, beginning the afternoon of October 11, 1971, when defendant left Whitewater with Hall in Hall's car, including the planning and his voluntary participation in the robbery and culminating with the arrest. After the typewritten statement was read to defendant the officer testified he said it was true. He was requested to sign it but stated he did not want to sign until his attorney arrived. The officers then signed the statement as witnesses noting thereon the time they signed as "6:00 a.m.". The typewritten statement was not read to the jury and the record discloses that it was not admitted in evidence.

Defendant contends that the trial court erred in allowing the officers to testify as to defendant's oral statement and as to defendant's refusal to sign the document after it had been reduced to writing. He relies on People v. Jones (1972), 4 Ill. App. 3d 888, 893; People v. Harris (1967), 83 Ill. App. 2d 422; People v. Lewerenz (1962), 24 Ill. 2d 295. These cases are inapposite. They hold in substance that it is error to admit evidence that a defendant remained mute when arrested and when asked to make a statement or that he refused to make a statement. In none of them did defendant make a voluntary oral confession as here.



In People v. Starnes (1972), 8 Ill. App. 3d 709, 714, where a similar argument was made the court said:

"It is true that if a defendant does not make a statement, evidence of his refusal to make the statement or to sign a waiver violates his constitutional right to remain silent and may not be admitted. (People v. Lewerenz (1962), 24 Ill. 2d 295, 299.) However, where a statement has been made, the testimony relates to the issue of whether, under the total circumstances, the statement is voluntary. There is then no violation of defendant's right to remain silent, because the defendant has not, in fact, remained silent."

Likewise, here defendant not having remained silent but having given an oral confession, it was proper to admit the testimony. In People v. Carter (1968), 39 Ill. 2d 31, 38, the court said:

"We have consistently held that the question of the competency of a confession is for the trial court alone to decide, and that the court is not required to be convinced of its voluntary character beyond a reasonable doubt when making its decision. (Citations) We shall not disturb that ruling unless we find the decision of the trial court to be manifestly against the weight of the evidence."

It was then a question for the trier of the fact--here the jury--to determine the credibility of the officers' testimony. People v. Ostrand (1966), 35 Ill. 2d 520, 532-533.

We consider next defendant's contention that he was not proved guilty beyond a reasonable doubt and that the trial court erred in denying his supplemental motion for a new trial grounded on the affidavit of Gary Hall, a co-defendant. The affidavit stated the affiant was "solely responsible for the \* \* \* armed robbery"; that defendant did not know Hall was armed when they entered the motel; that defendant "only did those acts necessary to "satisfy" Hall; and that "they had not discussed committing an armed



robbery". Defendant argues that the evidence at the trial was consistent with his testimony; that he did not take part in the planning or execution of the armed robbery other than "that which was done at the insistence of Hall"; and that Hall's affidavit is corroborating and suffices to establish grounds for a new trial.

While defendant seems now to be claiming to have participated with Hall in the armed robbery under compulsion, neither his testimony at the trial nor Hall's affidavit lends support to that theory. Sec. 7-11 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 7-11) provides:

"(a) A person is not guilty of an offense, \* \* \* by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct."

Nothing in the record nor in Hall's affidavit indicates or suggests there was any threat of inflicting death or great bodily harm upon defendant.

The trial court properly denied the defendant's supplemental motion for a new trial. Hall's affidavit did not set forth "newly discovered evidence". Defendant himself admits that he could have subpoenaed Hall to testify at the trial but asserts this would have been futile because Hall would have invoked his Fifth Amendment privilege against self incrimination. 1  
If Hall had been called as a witness and if he had invoked his constitutional privilege, defendant then could have properly raised his present argument. A court will consider newly discovered evidence as a basis for a new trial only if the evidence could not have been discovered before the trial



by the exercise of due diligence. (People v. Hughes (1973), 11 Ill. App. 3d 224, 228; People v. Johnson (1970), 123 Ill. App. 2d 69, 75; People v. Brown (1970), 125 Ill. App. 2d 336, 342.) While there were some contradictions between the testimony of the State's witnesses on the one hand and that of the defendant and defense witnesses on the other, these were questions for the jury. The credibility and weight to be given to the testimony of the witnesses for the defense and for the prosecution are a matter for the trier of fact, here the jury, and the determination made by the trier will not be disturbed unless palpably erroneous. (People v. Ostrand (1966), 35 Ill. 2d 520, 532, 533.) After examining the record we conclude that the evidence clearly established the defendant's guilt.

Finally, the defendant urges that under the Unified Code of Corrections the minimum term for armed robbery (Class 1 felony) is four years "unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term." (Ill. Rev. Stat. 1972 Supp. ch. 38, par. 1005-8-1 (c) (2) and par. 18-2). The code and its provisions are clearly applicable to the defendant's sentence since the new minimum sentence is less than under the prior law. While the minimum sentence of five years here imposed could comply with the Code, the conviction is affirmed and the cause remanded to the trial court for possible redetermination of the sentence under the Unified Code of Corrections.

Affirmed and remanded with directions.

THOMAS J. MORAN, P.J. and GUILD, J., concur.



FOOTNOTE

1. Defendant's supplemental motion for new trial discloses that on March 22, 1972, subsequent to defendant's trial, but prior to defendant's supplemental motion for a new trial, Hall pleaded guilty to armed robbery and received a sentence of 5 to 10 years.





58170

PHILIP R. DAVIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
	)	COOK COUNTY
CHICAGO & NORTH WESTERN RAILWAY	)	
COMPANY,	)	
	)	HON. JOSEPH HERMES,
Defendant,	)	Presiding
	)	
Appeal of WILLIAM F. WARE,	)	
	)	
Defendant-Appellant.	)	

MR. JUSTICE BURKE delivered the opinion of the Court:

This cause arose from a judgment of the circuit court of Cook County enforcing an attorney's lien in the amount of \$1300 in favor of plaintiff Davis. Defendant Ware appeals.

The relevant facts disclose that on April 6, 1971, plaintiff Davis, an attorney, filed an amended petition to enforce his attorney's lien against defendant Ware and the Chicago & North Western Railway Company. The petition alleged, inter alia, that defendant retained plaintiff on May 4, 1970, as his attorney to prosecute a claim against the Railway Company; on May 25, 1970, that plaintiff served notice of his attorney's lien on the Railway Company; that defendant Ware and the Railway Company settled defendant's claim for \$3900; and that \$2600 of the proceeds was paid directly to defendant and \$1300 was retained subject to plaintiff Davis' attorney's lien. The settlement agreement between defendant Ware and the Chicago & North Western Railway Company provided that the sum of \$1300 would be paid to an escrow agent to be agreed upon to the mutual satisfaction of the parties pending final determination and settlement of plaintiff's lien.



On January 17, 1972, defendant Ware answered the amended petition denying the allegations therein and demanding a trial by jury.

On July 28, 1972, the following judgment order was entered by the circuit court of Cook County:

"Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding, to-wit:

'THE COURT FINDS ISSUE AGAINST THE DEFENDANT, WILLIAM F. WARE, AND ASSESSES THE DAMAGES AT THIRTEEN HUNDRED AND NO/100 DOLLARS (\$1,300.00) AND COSTS.'

This cause coming on for further proceedings herein, it is considered by the Court that the Plaintiff have judgment on the finding herein, and that the Plaintiff have and recover of and from the Defendant, WILLIAM F. WARE, the damages of the Plaintiff amounting to the sum of THIRTEEN HUNDRED AND NO/100 DOLLARS (\$1,300.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor.

The above Judgment in favor of PHILIP R. DAVIS.

APPEAL ALLOWED TO THE APPELLATE COURT. BOND SET AT \$1,300.00."

On the same day, July 28, 1972, defendant Ware filed a notice of appeal in this court. Defendant argues on appeal that the trial of the issues should have been by jury as demanded in his answer.

Plaintiff Davis in his reply brief filed in this court maintains that the defendant waived his jury demand by proceeding to trial before the court without a jury. Williams v. Frank, 85 Ill.



App. 2d 85, 229 N.E.2d 408; LaSalle National Bank v. International Limited, 129 Ill. App. 2d 381, 263 N.E.2d 506; Andeen v. Country Mutual Insurance Co., 70 Ill. App. 2d 357, 217 N.E.2d 814.

Defendant Ware did not file a reply brief in this court. During the course of oral argument, however, defendant for the first time contended that he was not present in court on July 28, 1972, when the trial court entered the judgment and that the waiver doctrine is inapplicable.

It is a well established rule of appellate practice that the party claiming error has the burden of establishing any irregularities, and a party who seeks to reverse a judgment carries the burden of demonstrating that it is erroneous. (Molner v. Cartenos, 415 Ill. 172, 112 N.E.2d 470; Flynn v. Vancil, 41 Ill. 2d 236, 242 N.E.2d 237.) Moreover, on appeal every reasonable presumption not negated by the record will be indulged in support of the judgment. Error is never presumed by courts of review, but must be affirmatively shown by the record. Union Drainage Dist. No. 5 v. Hamilton, 390 Ill. 487, 61 N.E.2d 343.

Defendant did not file a report of proceedings. We are of the opinion that the judgment order entered by the trial court on July 28, 1972, which recites in relevant part "Now come the parties to this cause" is presumptively binding upon defendant Ware and negates his contrary assertion made during oral argument. If defendant Ware had filed a report of proceedings, the report would indicate whether defendant Ware was physically present in court at the time of the trial and what objections, if any, he made as to proceeding with the trial without a jury. Defendant elected not to file a report of proceedings.



58170

Under these circumstances, we must presume that the proceedings in the trial court were regular and the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and HALLETT, JJ., concur.



19 I.A. 899<sup>3D</sup>



59133

MARGARET B. MURPHY,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
	)	
THOMAS F. MURPHY,	)	HON. REUBEN J. LIFFSHIN,
	)	Presiding
	)	
Defendant-Appellant.	)	

MR. JUSTICE BURKE delivered the opinion of the court:

This action originated in 1955 in Cook County, Illinois, as a complaint for separate maintenance by the plaintiff, Margaret Murphy. The court entered a decree specifying the amounts to be paid by the defendant, Thomas Murphy, as and for separate maintenance. The decree was last modified in June, 1968, to provide that when the Murphys' son Richard graduated from college, the weekly payments to the plaintiff would be increased from \$85 to \$100. Richard graduated from college in June, 1969. On February 10, 1970, the plaintiff filed a petition for a rule to show cause why the defendant should not be held in contempt of court for failure to increase the weekly payments to \$100 from the time of Richard's graduation. The petition asked the court for an order that the defendant pay the attorneys' fees necessitated by the filing of the petition and for such other orders as the court deemed proper. The defendant filed an answer to the petition, alleging that his net income, upon which the required payments had been based, had declined from \$12,000 at the time of the decree, to \$8000. Hence, he argued, the required payments should also be reduced. He further alleged that the parties were both residents of California and not subject to the jurisdiction



of the Illinois courts. No further action was taken on this petition.

On December 8, 1972, the plaintiff filed a petition to modify the order entered in June, 1968, so to increase the payments required of the defendant because of an alleged increase in his income. On that same day the plaintiff filed a second petition for a rule to show cause, substantially the same as the petition of February 10, 1970, but alleging in addition that the defendant had failed to maintain insurance policies as ordered in June, 1968. The petition asked that arrearages be set at \$4185. Defendant filed an answer to this petition, again citing the changes in his financial condition, asking that his required payments be reduced and announcing that he was about to go on social security.

The cause came on for hearing on January 10, 1973. No witnesses were called, although the record indicates that the plaintiff was present. The matter was continued and came on for hearing on March 1, 1973. Again, no witnesses were called, but after discussion by the court and counsel for both parties, the amount of arrearages was set at \$2575 and judgment was entered for that amount. The defendant appeals.

The defendant has filed his brief and abstract and complied with all the statutory requirements and rules of this court for prosecuting an appeal. The plaintiff has filed neither a brief nor an appearance in this court. Since she has failed to comply with the rules of this court, we need not consider the cause on the merits. (Latronica v. Latronica, 97 Ill. App. 2d 332, 240 N.E.2d 458; Basinski v. Basinski, 20 Ill. App. 2d 336, 156 N.E.2d



59133

225; C.I.T. Corp. v. Blackwell, 281 Ill. App. 504.) The judgment is reversed and the cause remanded with directions to conduct a full hearing with respect to all matters involved in the various 1972 petitions.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS

EGAN, P.J. and HALLETT, J., concur.

4/22/14.  
H. O. P. M. S.  
1st Div.

59542



19 I.A. 30 945

HARRY ROBBINS, d/b/a )  
ROBBINS SPORTING GOODS )  
& SKI SHOP, )

Plaintiff-Appellee, )

v. )

SEAY & THOMAS, INC., as )  
agents for BENJAMIN )  
GRAIS, JOSEPH GRAIS, and )  
EDWARD GRAIS, executors of )  
the Estate of Ruben Grais, )  
deceased, )

Defendants-Appellants. )

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
WALLACE J. KARGMAN,  
Presiding.

PER CURIAM:

A complaint was filed by plaintiff seeking damages for the alleged negligent destruction of an advertising sign which had been affixed to the front of a building in which plaintiff had leased store space from the defendants. An answer was filed denying negligence in the maintenance of the building and asserting the affirmative defense of non-liability by virtue of an exculpatory clause in the lease. Defendants' motion for summary judgment, predicated upon that clause, was denied. Upon trial by the court, sitting without a jury, judgment was entered for plaintiff and against defendants in the amount of \$1,989.46 plus costs. Defendants appeal, after denial of a post-trial motion, contending that their affirmative defense of non-liability constituted an absolute defense to the complaint and that the trial court improperly applied the rule of strict construction to the exculpatory clause in the lease.

On August 17, 1970, the plaintiff as lessee leased from defendants as lessor the first floor store at 323-325 South Wacker Drive, Chicago, described as the "premises," for the



period of October 1, 1970, through April 30, 1973. The lease, a standard printed form of store lease, demised the aforementioned premises and "the appurtenances thereto" and specifically provided in paragraph 8:

Lessor shall not be liable to Lessee for any damage or injury to him or his property occasioned by the failure of Lessor to keep the Premises in repair, and shall not be liable for any injury done or occasioned by wind or by or from any defect of plumbing, electric wiring or of insulation thereof, gas pipes, water pipes or steam pipes, or from broken stairs, porches, railings or walks, or from the backing up of any sewer pipe or down-spout, or from the bursting, leaking or running of any tank, tub, washstand, water closet or waste pipe, drain, or any other pipe or tank in, upon or about the Premises or the building of which they are a part nor from the escape of steam or hot water from any radiator, it being agreed that said radiators are under the control of Lessee, nor for any such damage or injury occasioned by water, snow or ice being upon or coming through the roof, skylight, trap-door, stairs, walks or any other place upon or near the Premises, or otherwise, nor for any such damage or injury done or occasioned by the falling of any fixture, plaster or stucco, nor for any damage or injury arising from any act, omission or negligence of co-tenants or of other persons, occupants of the same building or of adjoining or contiguous buildings or of owners of adjacent or contiguous property, or of Lessor's agents or Lessor himself, all claims for any such damage or injury being hereby expressly waived by Lessee.

Paragraph 9 of the lease was also in printed form and provided in part that the lessee shall not affix any sign to any wall upon the premises or appurtenances without prior express written permission of the lessor. Paragraph 26 of the lease was typewritten, inserted by the parties, and provided that any sign displayed "in the premises and on the building in which said premises are located" shall be of a certain nature and character.

On November 17, 1971, while the lease was in force and effect, a sign belonging to plaintiff, which had been attached to the front exterior wall of the building over plaintiff's store windows, was damaged beyond repair when a portion of



the facade of the building fell, striking the sign. This action was commenced, the complaint alleging that the defendants were negligent in the maintenance of the building contrary to the terms of the lease. The answer to the complaint denied the negligence alleged and asserted the affirmative defense of non-liability on the ground that the exculpatory clause barred recovery. Replies to the answer to the complaint asserted the unenforceability of the exculpatory clause, based on Ill. Rev. Stat. 1971, ch. 80, par. 91, and Ill. Rev. Stat. 1969, ch. 80, par. 15a, which allegedly rendered void and unenforceable such exculpatory provisions, and further asserted defendants' knowledge of the defect which caused the injury in question and plaintiff's lack of awareness of the full import of the exculpatory clause at the time of the execution of the lease.

A stipulation was entered between the parties that the sign had been affixed to the building "with the knowledge and consent" of the defendants, but that no agreement or other correspondence pertaining to the sign, other than the instant lease, was in existence. The record on appeal does not contain a report of proceedings taken at the time the judgment was entered; however, the record does contain the report of proceedings taken at the hearing on defendants' post-trial motion which discloses that the trial court had denied defendants' motion for summary judgment and had given a strict construction to the exculpatory clause of the lease.

The language of the exculpatory clause in question appears to be something less than all-inclusive as to the areas of the building to which the waiver of liability applied. Although the terms "the building" and "appurtenances"



are employed in that clause, its primary concern is with "the premises," described in the preamble to the lease as the area demised. Such clauses have been declared by the legislature as void and unenforceable (Ill.Rev.Stat. 1971, ch. 80, par. 91), but at the time the instant lease was executed such clauses were held valid and enforceable (O'Callaghan v. Waller & Beckwith, 15 Ill. 2d 436, 155 N.E. 2d 545; Bruno v. Gabhauer, 9 Ill. App. 3d 345, 292 N.E. 2d 238) and could apply to and include areas of a building not specifically demised to the lessee against whom it was enforced. (Olson v. Hoffman, 65 Ill.App.2d 87, 213 N.E. 2d 68. See also Sweney Gas. Co. v. T.P. & W.R.R. Co., 42 Ill. 2d 265, 247 N.E. 2d 603.)

Paragraph 9 of the lease in the instant case evidences the intention of the parties that the erection of a sign on the demised premises, or on the building in which the premises are located, was to be subject to a separate and specific agreement between the parties. Although paragraph 26 of the lease relates to the nature and character of any sign sought to be erected, that portion of the lease does not permit the erection of such sign, in the first instance. Under such circumstances, the rule of strict construction applicable to exculpatory clauses in leases requires the conclusion that on its face, the instant exculpatory clause does not cover the defendants' negligence in relation to the sign in question since its erection was not intended by the parties to be a part of the lease. (Moss v. Hunding, 27 Ill.App.2d 189, 193-194, 169 N.E. 2d 396.) Consequently, a question of fact arose as to whether the exterior portion of the building onto which the sign was affixed—considering the somewhat limited



areas of the building which were covered by the exculpatory clause—constituted an "appurtenance" to the demised premises within contemplation of the lease so as to have been subject to the provisions relating to the waiver of liability. (See Olson v. Hoffman, 65 Ill. App. 2d 87, 213 N. E. 2d 68.)

The stipulation of facts recites that no agreement had been reached between the parties with respect to the erection of the sign, although the defendants "knew" of its existence and "had consented" thereto. What that knowledge and consent consisted of and whether it comprised a part of the lease so as to have rendered the exterior portion of the building an "appurtenance" to the demised premises and subject to the exculpatory clause were questions for resolution by the trier of fact. (Olson v. Hoffman, supra.)

The judgment of the trial court in the instant case, sitting without a jury and as trier of fact, recites that evidence was heard and considered by the court. The report of proceedings taken at the hearing on defendants' post-trial motion discloses that the trial court had denied the defendants' motion for summary judgment and had given a strict construction to the exculpatory clause. Implicit in both the denial of the motion for summary judgment and the entry of the judgment for the plaintiff is the finding by the trial court that a question of fact was presented by the circumstances of the case and that the defendants' negligence in relation to the damage to the sign in question was not included within the scope of the exculpatory clause. The record does not contain a report of proceedings taken at the



time judgment was entered in the case. Absent the filing of such report of proceedings on this appeal—as was the burden of the defendants as appellants in the case—this court will presume that the trial court heard proper and sufficient evidence upon which to have based its ruling. (Perez v. Janota, 107 Ill. App. 2d 90, 246 N. E. 2d 42.)

For these reasons, the judgment of the circuit court is affirmed.

Judgment affirmed.

THIRD DIVISION.

Justice Dempsey did not participate.



19 I.A. 946<sup>3D</sup>



No. 59577

LEE V. OLENZ,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	
	)	COURT OF COOK COUNTY.
vs.	)	
	)	HONORABLE
PATRICK J. CLEARY, et al.,	)	F. EMMETT MORRISSEY,
	)	PRESIDING.
Defendants-Appellees.	)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, Lee V. Olenz, has brought this pro se appeal from a judgment of the circuit court of Cook County affirming a decision of the defendant Board of Review of the Illinois Department of Labor which declared plaintiff ineligible for further unemployment compensation benefits. Ill.Rev.Stat. 1971, ch.48, par.437(b).

Plaintiff was employed by defendant Teletype Corporation as a systems analyst until his last working day on July 9, 1971. On August 4, 1971 plaintiff filed a claim for unemployment compensation benefits based on wages paid to him during the base period ending March 31, 1971. A deputy of the Department found that plaintiff was entitled to weekly benefits, and plaintiff received a weekly benefit for each of twenty-six weeks ending February 5, 1972. Plaintiff received thereafter thirteen weeks of extended benefits ending May 6, 1972. Plaintiff's benefit year ended on July 31, 1972.

On July 9, 1972 plaintiff received a lump sum payment, equal to nine weeks' salary, from Teletype. The payment was characterized as a lay-off allowance.

On August 2, 1972, the plaintiff filed a new claim for an additional year of unemployment compensation benefits. On August 11, 1972, a deputy declared plaintiff ineligible for further benefits based on section 607(b) of the Unemployment Compensation Act. Section 607(b) states as follows:

an individual shall be ineligible for benefits for any week in a benefit year which begins on or after January 1, 1972 unless, subsequent to the beginning of his immediately preceding benefit year with respect to which benefits were paid to him, he performed bona fide work and earned remuneration for such work equal to at least three times his current weekly benefit amount.



Plaintiff appealed the decision of the deputy. Plaintiff claimed that the lay-off allowance received from Teletype on July 9, 1972 constituted wages and thus rendered him eligible for further benefits. On September 20, 1972, a referee affirmed the deputy's decision. The referee held that the lay-off allowance was not wages given for "bona fide" work under section 607(b) because the plaintiff was not required to perform any work for the allowance. The referee further found that since plaintiff was furnished unemployment compensation benefits for the weeks covered by the lump sum lay-off payment: "to hold that the claimant requalified for benefits during these weeks would be to hold that the claimant was eligible for benefits when at the same time holding that the claimant was not an unemployed individual during these weeks in question."

On February 21, 1973, the Board of Review affirmed the referee's finding. The Board indicated that the question of how plaintiff was terminated from employment was irrelevant to whether he was qualified to receive further benefits under the Act. The Board analogized the lay-off allowance to vacation pay received during the first benefit year. Citing an earlier decision, the Board held that the lay-off payment to plaintiff by Teletype was not given for bona fide work. It also held that the lay-off allowance did not constitute wages.

Plaintiff, on March 19, 1973, filed a complaint for administrative review. On May 15, 1973, Judge Edward Healy granted Teletype's motion and struck plaintiff's complaint. At the same time, Judge Healy, recommending that plaintiff hire an attorney, gave him until May 31 to file an amended complaint. Instead, on May 21, plaintiff filed a motion requesting that Judge Healy remove himself from the case because his decision had been arbitrary and partial to Teletype. The judge forthwith disqualified himself from the case. The assignment judge subsequently transferred the cause to Judge F. Emmett Morrissey. On June 27, 1973, Judge Morrissey sustained



the Board's decision.

In administrative review actions, the court's function is to determine if the entire record of the administrative agency contains evidence to support the findings of that body. (Golden Egg Club, Inc. v. Illinois Liquor Control Commission (1970), 124 Ill.App.2d 241, 260 N.E.2d 329.) It is not the proper function of an appellate court on review to reweigh the evidence presented at hearings before an administrative body but rather the court should determine whether the trial court's decision is correct or in error. (Board of Education of Springfield School District No. 186 Sangamon County v. Scott (1969), 105 Ill.App.2d 192, 244 N.E.2d 821.) A reviewing court will not disturb the factual findings of an administrative agency unless the findings are clearly against the manifest weight of the evidence. (Moriarty v. Police Board of the City of Chicago (1972), 7 Ill.App.3d 978, 289 N.E.2d 32.) In order for an administrative agency's decision to be contrary to the manifest weight of the evidence an opposite conclusion must be clearly evident. Bock v. Long (1972), 3 Ill.App.3d 691, 279 N.E.2d 464.

In the present case, the finding of the Board is amply supported by the record and a reading of section 607(b) of the Act. To qualify for further benefits, plaintiff was required to have performed bona fide work within the benefit year, August, 1971 to July 31, 1972, and to have received wages for such work in that period equal to three times his weekly benefit amount. Plaintiff's argument that the lay-off allowance he received from Teletype on July 9, 1972 met these requirements is without merit. The Board correctly found that such an allowance was not a wage for bona fide work performed within the benefit year. The Board's decision was not against the manifest weight of the evidence, and the trial court properly sustained its decision.



Plaintiff's next contention that he was prejudiced by the arbitrary actions of Judge Healy is equally without merit. Judge Healy's only action prior to removing himself from the case was to order plaintiff to file an amended complaint, an order with which plaintiff failed to comply. Judge Healy did not dismiss Teletype as a defendant; indeed Teletype was never dismissed as defendant. It is beyond understanding how any preliminary ruling by Judge Healy could have affected the subsequent trial judge's affirmance of the Board's decision.

Plaintiff also maintains that the actions of Judge Morrissey were arbitrary and unjust. He apparently bases this contention on the judge's refusal to certify plaintiff's report of proceedings. The judge acted correctly. Plaintiff's proposed report of proceedings contained his recollections of what occurred at three hearing dates, only one of which was presided over by Judge Morrissey. That hearing, on June 8, 1973, involved a request for a continuance. No proposed report of proceedings was submitted to Judge Healy. Plaintiff did not comply with Supreme Court Rule 323(c) in attempting to furnish a report of proceedings where no verbatim transcript was available. Just as significantly, plaintiff has failed to demonstrate how the absence of a transcript for those three dates involving procedural events has in any way affected a determination of his rights to additional unemployment compensation benefits.

Using intemperate and vituperative language, the plaintiff has made the scandalous charge that various State agencies and officials, the Attorney General's office, and the judiciary have conspired criminally with his ex-employer Teletype to deprive him of his rights. The language is unfortunate; the charges are baseless.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McGLOON and MEJDA, JJ., concur.





7/11/61

57009

19 I.A. <sup>3D</sup> 957

CORONET INSURANCE COMPANY,	)	
	)	
Plaintiff-Appellant-	)	APPEAL FROM THE
Cross-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.	)	
	)	HON. FRANK A. LOVERDE,
CHARM HOME CARPETING, INC.,	)	Presiding
	)	
Defendant-Appellee-	)	
Cross-Appellant.	)	

MR. JUSTICE BURKE delivered the opinion of the court:

This is an action by the plaintiff, Coronet Insurance Company, for recovery of the price paid for carpeting purchased from the defendant, Charm Home Carpeting, Inc. After trial without a jury, the court awarded the plaintiff damages in the amount of \$750. The plaintiff appeals on the grounds that the court erred in basing the amount of damages on the cost of repairing the carpet. The defendant cross-appeals on the grounds that the court erred in finding for the plaintiff after determining that no breach of warranty was proved.

It is undisputed that the plaintiff contracted to purchase carpeting from the defendant at a cost of \$2,961.25. The carpeting was installed in the plaintiff's offices, and the plaintiff paid the full purchase price. No pads or mats for use under office furniture were ordered by the plaintiff. A few weeks after installation, the carpet began to show signs of damage, particularly at points under caster-equipped chairs. The basic dispute in this case involves the plaintiff's contention that the defendant claimed that the carpeting installed in the plaintiff's offices would withstand the movement of swivel



chairs, and that chair pads were unnecessary. The defendant claimed that the plaintiff was warned that chair pads were essential to protect the carpeting. At the conclusion of the evidence, the trial judge announced that he found no breach of warranty by the defendant. The judge proceeded, however, to award damages to the plaintiff based on his personal opinion of the cost of repairing the carpet.

To the plaintiff's argument that the trial judge erred in awarding the cost of repairing the carpeting, rather than the full purchase price sought, the defendant responds that the award was not contrary to the manifest weight of the evidence, and the damages were within the range of allowable awards. The problem in this case is not the amount awarded but, as the defendant argues on cross-appeal, that there was any award at all. The critical issue at trial was whether the plaintiff was informed by the defendant that the carpeting it purchased was so durable that pads under the office furniture were unnecessary, when in fact the pads were necessary. The court found that there was no breach of warranty but awarded the cost of repairing the carpeting to the plaintiff. A court may not compromise the decision on liability by making a finding for inadequate damages. (American Nat. B. & T. Co. v. Reserve Ins. Co., 38 Ill. App. 2d 315, 187 N.E.2d 343.) Such a finding is neither for the plaintiff nor the defendant and cannot be allowed to stand. (Jenkins v. Gerber, 336 Ill. App. 469, 84 N.E.2d 699.) The damages awarded must be consistent with the evidence and the findings of fact in the case. Where there is obvious inconsistency, reversal is required. We find such inconsistency here. The judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

EGAN, P.J. and GOLDBERG, J., concur.



58943



19 I.A. 995<sup>3D</sup>

RICHARD J. DALEY, Mayor and Local  
Liquor Control Commissioner of  
the City of Chicago,

Plaintiff-Appellee,

v.

ULYSSES BATITSAS,

Defendant-Appellant.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
ROBERT J. DOWNING,  
Presiding.

PER CURIAM:

Defendant appeals from a judgment of the circuit court of Cook County reversing an order of the License Appeal Commission which in turn reversed an order of the Local Liquor Control Commissioner of the City of Chicago revoking defendant's liquor license on the ground that the licensee, through his agents, allowed solicitation for the purposes of prostitution. The issue on review is whether or not the evidence supports the findings of the Local Liquor Commissioner.

At the hearing before the Commissioner, a Chicago Police officer, Robert O'Donald, testified that on April 8, 1971, he and his partner, Officer Sokolnicki, investigated the lounge at 1507 West Madison Street, Chicago. At approximately 7:30 a.m., he entered the premises with a female named Dorothy whom he met in the doorway. His partner entered the lounge ten minutes later. Dorothy introduced him to the barmaid, Cleo Martello, and asked if she could set him up with a girl. When asked, "Why can't you take care of the fellow?" Dorothy said, "I'm not in the mood right now." Cleo Martello said, "Well, if he spends some money I can get him a girl." Officer O'Donald asked what she meant by spending money and she replied, "Well, when you meet a girl, it's between you and the girl." She then served him a drink and he observed her make several telephone calls. A short time later Martha



Webb entered the lounge and sat down at the front of the bar. Immediately after a conversation with Cleo Martello she came over and sat next to O'Donald. In his testimony Officer O'Donald stated that after having a conversation with Martha Webb he called Cleo Martello over and told her he "was going to lay Martha Webb for \$50." She said she was glad he had scored and that he should have a good time. The three of them then had drinks together. O'Donald and Martha Webb then left the premises and went to her apartment, where she told O'Donald to wait in the car while she made sure her landlord was not watching. Officer Sokolnicki came over to the car and was talking with O'Donald when Martha Webb looked out the window. When she saw them talking she tried to run and was apprehended as she attempted to leave the premises.

Officer David Sokolnicki testified that on April 8, 1971, he and his partner, Officer O'Donald, made an investigation of the lounge at 1507 West Madison Street, Chicago. At approximately 7:30 a.m., Sokolnicki entered the lounge and sat down at the bar. He observed his partner talk to Dorothy, the barmaid, Cleo Martello, and later to Martha Webb. At approximately 10:00 a.m., he went outside. When he saw O'Donald leave with the Webb girl he followed them to her apartment building and met his partner in the alley behind the building. While they were talking the girl looked out the window and saw them; she attempted to leave and was placed under arrest.

Ulysses Batitsas testified that he is the licensee for the lounge at 1507 West Madison Street, Chicago; that he was not present in the lounge on April 8, 1971, and had no personal knowledge of what occurred on that date.



Cleo Martello testified that on April 8, 1971, she was working as barmaid for Ulysses Batitsas. At approximately 7:30 a.m., Officer O'Donald entered and sat at the middle of the bar. She denied ever speaking to him about getting him a woman. At about 10:30 a.m., Martha Webb came in with a man; they had several drinks, then left. Officer O'Donald left the premises alone.

At the conclusion of the hearing the Liquor Control Commissioner found:

"That on April 8, 1971, the licensee by and through his agents, allowed a female person on the licensed premises, one Martha Webb, to solicit a police officer for purposes of prostitution, contrary to the Ordinances of the City of Chicago, Statutes of the State of Illinois, and Rules of the Illinois Liquor Control Commission."

Defendant appealed the finding of the Commissioner to the License Appeal Commission which reversed the finding on the basis that it was "not supported by substantial evidence in light of the whole record."

Plaintiff filed an action in the circuit court of Cook County under the Administrative Review Act. The court found that the determination of the Illinois Liquor Control Commissioner was supported by the evidence and reversed the order of the License Appeal Commission.

Defendant appeals, arguing that the finding and conclusion of the Liquor Control Commissioner of the City of Chicago, in revoking his liquor license, were against the manifest weight of the evidence and must be set aside. In Nechi v. Daley, 40 Ill.App. 2d 326, 188 N.E. 2d 243, the court stated the rule regarding review of an administrative agency:



"Under the Administrative Review Act the findings and conclusions of the administrative agency on questions of fact are to be held prima facie true and correct (Ill Rev Stats 1961, c 110, §274). The law in Illinois is well settled that the scope of judicial review is limited to a consideration of the record to determine if the findings and orders of the administrative agency are against the manifest weight of the evidence, and it has been consistently held that the courts are not authorized to reweigh the evidence or to make an independent determination of the facts."

See also Sarytchhoff v. License Appeal Com., 11 Ill.App. 3d 735, 297 N.E. 2d 646.

In the case before us, Officer O'Donald testified that upon entering the bar he was introduced to the barmaid, Cleo Martello. When asked if she could fix him up with a girl she replied, "Well, if he spends some money I can get him a girl." She then made several telephone calls. A short time later Martha Webb entered the bar, and after a conversation with Cleo Martello she sat down next to Officer O'Donald. After talking with the girl, O'Donald told Cleo Martello that he "was going to lay Martha Webb for \$50." The barmaid said she was glad to see that he had scored and that he should have a good time. The three of them had drinks together, and O'Donald and the Webb girl left for her apartment. The testimony of Officer O'Donald was sufficient to establish that Cleo Martello, defendant's barmaid, aided in the solicitation of O'Donald for the purpose of prostitution. (Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill.App. 2d 264, 254 N.E. 2d 814.) A liquor licensee is responsible for the actions of his agents (Ill. Rev. Stat. 1971, ch. 43, par. 185). The evidence adduced at the hearing before the Commissioner was sufficient to support the license revocation.

Accordingly, the judgment of the circuit court is affirmed.

Judgment affirmed.

THIRD DIVISION:

Justice Dempsey did not participate.





BENEDICT CIESLAK,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellant,	)	COOK COUNTY
	)	
v.	)	
	)	
DAHLSTROM MACHINE WORKS, INC.,	)	HONORABLE
	)	FRANCIS GLOWACKI,
Defendant-Appellee.	)	Presiding.

PER CURIAM:

Plaintiff brought suit in the circuit court against the defendant company to recover a commission for the sale of defendant's machines. In a trial without a jury the trial judge granted the defendant's motion for a directed finding at the close of plaintiff's case on the ground that plaintiff's acceptance of a check from defendant constituted an accord and satisfaction. Plaintiff appeals.

Plaintiff worked for defendant company as a manufacturer's representative on a commission basis. On March 6 or 7, 1969, plaintiff came into defendant's plant with a delegation from the Vieille Montagne Company, a Belgian corporation, which was interested in buying equipment manufactured by defendant. Following that visit and correspondence between the parties, Vieille Montagne Company purchased machinery in the amount of \$123,450 from defendant company. Subsequently, defendant sent plaintiff a check for \$3,856.25, accompanied by a statement listing the commission on the various items of the sale, in a total amount of \$7,712.50, then divided the commission by two, to a total of \$3,856.25. Nothing was written on the check. When the check and statement were received plaintiff called Harold Williamson, President of defendant company, and was told that that amount was his full commission. Plaintiff voiced his disapproval and asked for a meeting, to which Williamson agreed. Prior to the meeting held the next day, plaintiff endorsed the check as partial commission and deposited it in his bank account.



Plaintiff argues that the trial court improperly ruled that an accord and satisfaction had been established by the evidence. To constitute an accord and satisfaction there must exist a bona fide dispute (Koretz v. All American Life & Cas. Co., 102 Ill.App. 2d 197, 243 N.E. 2d 586), the sum in dispute must be unliquidated (A. & H. Lithoprint v. Bernard Dunn Advertising, 82 Ill.App. 2d 409, 226 N.E. 2d 483), and there must be a meeting of the minds with intent to compromise. (Metro-Goldwyn-Mayer v. ABC-Great States, 8 Ill.App. 3d 836, 291 N.E. 2d 200.)

In the instant case there was nothing written on the check to indicate that it was in full settlement of the claim. Similarly, the statement accompanying the check did not in any manner indicate that it was in full settlement of the claim, but stated only that the full commission was \$7,712.50. The statement divided the commission by two, producing a sum of \$3,856.25. After receiving the check, plaintiff contacted defendant company's president who told him that \$3,856.25 was his entire commission. When plaintiff voiced his disapproval both parties agreed to a meeting the following day. Prior to that meeting plaintiff deposited the check. During the telephone conversation between plaintiff and Williamson nothing was said about acceptance of the check being satisfaction of the claim in full. Williamson, by agreeing to a meeting, indicated that the matter was at that point still open to discussion. When plaintiff deposited the check prior to the meeting with Williamson, there was no meeting of the minds with the intent to compromise expressed, nor under these circumstances can one be implied. The depositing of the check by plaintiff did not constitute an accord and satisfaction.



Defendant argues that aside from the issue of accord and satisfaction, plaintiff has no right to further compensation on the sale, based on either a contract or on fair market value of his services. A directed finding should be entered only in those cases in which all the evidence, when viewed in the aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary result based upon that evidence could ever stand. (Pedrick v. Peoria & Eastern R. R. Co., 37 Ill. 2d 494, 229 N.E.2d 504; Bochenek v. Bochenek, 5 Ill.App. 3d 65, 283 N.E. 2d 95.) In ruling on a motion for a directed finding without a jury, the trial court must weigh the evidence and pass on the credibility of witnesses. (Allfree v. Estate of Rosenthal, 113 Ill.App. 2d 90, 251 N.E. 2d 792.)

In the instant case, after a careful review of the entire record, we believe there was sufficient evidence which—if believed by the trier of fact—could have established a prima facie case as to plaintiff's claim. The trial court did not rule upon the sufficiency of the evidence aside from the issue of accord and satisfaction. Inasmuch as we hold that the trial court erred in directing a finding on the basis of accord and satisfaction, the cause must be remanded to the trial court for further proceedings.

For the foregoing reasons, the judgment of the circuit court is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed herein.

Reversed and remanded.

THIRD DIVISION.

Justice McGlohn did not participate.



No. 57033

SHARON JUDGE, )  
 )  
 Plaintiff-Appellant, )  
 )  
 v. )  
 )  
 LORRAINE PETRAK, )  
 )  
 Defendant-Appellee. )

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY

HONORABLE  
ARCHIBALD J. CAREY, JR.  
PRESIDING



\*  
PER CURIAM (Fifth Division, First District):

Plaintiff filed a complaint seeking damages for injuries allegedly sustained in a collision involving an automobile in which she was riding as a passenger, and an automobile operated by defendant. A jury verdict was returned in favor of the defendant. Plaintiff appeals, following the denial of her post trial motion, contending that she was entitled to a directed verdict as to liability since the evidence viewed most favorably to the defendant so overwhelmingly favors the plaintiff that no contrary verdict can stand; she relies upon Pedrick v. Peoria & Eastern R. R. Co., 37 Ill. 2d 494, 229 N.E.2d 504, in support of this position. Defendant argues that the defendant's culpability, if any, was a matter properly submitted for resolution by the jury.

The evidence adduced at trial pertinent to the issue in this appeal is as follows.

The mishap occurred at approximately 12:30 a.m. on January 22, 1966, in the westbound lanes of traffic at 2645 [sic] West 87th Street, Chicago. A light snow had been falling and the roadway was slippery. Eighty-seventh Street at that location consisted of two eastbound and two westbound lanes of traffic, with a speed limit of 30 or 35 miles per hour; the investigating police officer however was of the opinion that the highway consisted of single lanes of traffic in each direction at the time of the mishap although that condition could have been

---

\* SULLIVAN, P.J., BARRETT and LORENZ, JJ., participating.



different at the time of trial. Approximately one and one-half blocks to the east of the point of impact 87th Street is intersected by a railroad track, and immediately prior to the mishap a passing train had caused traffic to back up in both eastbound lanes and both westbound lanes along 87th Street. Defendant's vehicle had pulled out of a parking area which serviced a restaurant fronting on the south [sic] side of 87th Street with the directional aid of a truck driver whose vehicle had been standing in one of the eastbound lanes of traffic, and she had proceeded through the two standing eastbound lanes in anticipation of executing a left-hand turn onto westerly 87th Street. As defendant's vehicle proceeded a short distance into the westbound lanes, it was struck in the front end by a vehicle driven westerly by Thomas Sommers. Plaintiff, a passenger in Sommers' vehicle, was injured in the mishap and hospitalized for a short period. Defendant's automobile was pushed into a third vehicle by the impact, which latter vehicle was standing in the eastbound lanes of traffic but which is not involved in this action.

George Betts, for plaintiff:

He is a Chicago police officer and investigated the accident in question a few minutes after it had occurred. Three vehicles were involved, the westbound Sommers vehicle, the northbound defendant's vehicle and an eastbound vehicle. Defendant told him that she did not see the Sommers vehicle approaching. He described the damage to the vehicles involved.

Plaintiff, in her own behalf:

She had been ice-skating with friends on the evening of the mishap, after which she was being driven to her home which was located west of Western Avenue by Thomas Sommers, in the company of another youth. The Sommers vehicle proceeded westerly along 87th Street and was stopped for a passing train at a point about four blocks west of Western Avenue. After they waited about 15 minutes for the train to



pass, the Sommers vehicle proceeded on. She observed headlights in their lane of traffic and a collision occurred, causing her to hit the steering wheel and dashboard with the left side of her body and her right knee and rendered her unconscious. She was taken by ambulance to the hospital where she remained until daybreak. She described her injuries, the treatments received therefor, and their after-effects.

She also testified that vehicles were present along the right side of the Sommers vehicle; there were two lanes of traffic backed up on the west side of the train; and it was a distance of one-half block or less from the train tracks to the point of impact. She observed the headlights of the other vehicle when they were less than a car length away and a "split second" before the impact. She had previously testified on deposition that she first observed defendant's vehicle about one-half block or less from the point of impact; she did not see defendant's vehicle for the length of time it would have taken to drive a half block and she had time to exclaim "Oh no." The Sommers vehicle was yet in second gear when the collision occurred and had been travelling about 20 miles per hour.

Thomas Sommers, for plaintiff:

He had been ice-skating with the plaintiff and friends on the night of the mishap, which had occurred while he was driving plaintiff home. The Sommers vehicle, which belonged to his parents, was in good mechanical condition. He waited 10 to 15 minutes for the train to pass, after which he proceeded westerly along 87th Street at a speed of about 20 miles per hour because the road was slippery. He travelled about a half block when he saw the defendant's automobile about one and a half car lengths in front of his vehicle; he observed other vehicles to the right of him; he applied his brakes but slid into the defendant's vehicle, which was about one-half to one-third of a car length into his



lane of traffic. One to two seconds elapsed between the time he observed defendant's vehicle and the time of the collision. The plaintiff stated to him that she was "shook up" after the impact, and he aided her until the police and the ambulance arrived. No one in his vehicle consumed liquor that night and the plaintiff did not tell him that she was late in getting home. A truck driver had been present at the scene when the police arrived, but was later dismissed by the officer.

Defendant, in her own behalf:

She was returning from a nearby theater with her mother and three sisters and had stopped at a pizza restaurant at 2646 [sic] West 87th Street about 11:30 p.m. After leaving the restaurant she started her automobile and allowed it to warm up. Traffic in the eastbound lanes along 87th Street was backed up due to a passing train to the east of the restaurant, and since she had intended to drive out from in front of the restaurant onto westbound 87th Street, a truck driver who had been stopped in the eastbound lanes backed up his truck and waved her through those lanes of traffic. She "took his word" that traffic from the east was clear, because he was "high up"; she "did and did not" rely on the truck driver for assistance, but she "probably did" rely on him as to whether traffic was clear. She started "creeping" her vehicle through the eastbound lanes of traffic, with her foot on the brake, looking both westerly and easterly. When she looked easterly, she saw no on-coming traffic for about two and one-half car lengths, and could also see that the train was still passing 87th Street and the railroad lights still flashing. When she reached the center line of 87th Street, she stopped her vehicle, checked traffic left and right, and proceeded again. Her vehicle had just started over the center line and was travelling about three miles per hour when it was struck in the right front portion by the Sommers vehicle and



pushed into a vehicle standing to her left. She did not know the speed at which the Sommers vehicle was travelling, and she did not see that vehicle prior to the collision.

The evidence adduced at trial created a question of fact for the jury to decide. As plaintiff correctly argues, there was evidence that defendant proceeded into the westbound lanes of traffic at the direction of the unidentified truck driver. But there was also evidence that the defendant took independent action to insure a safe entry into those lanes of traffic. The jury could justifiably have found that defendant acted in a reasonable and prudent manner in proceeding into the westbound lanes after she had stopped at the center line and observed traffic conditions in both directions and after she had also observed that the train was still passing across 87th Street and the signal lights still flashing. Under these circumstances we cannot say that the evidence so overwhelmingly favors plaintiff so that the Pedrick rule should apply.

The record further does not disclose what jury instructions were given or refused on the question of liability. It was plaintiff's duty, as appellant in this case, to perfect the record in that regard; this Court will assume in such circumstances that the jury was properly instructed on that question. (See, e.g., Perez v. Janota, 107 Ill. App. 2d 90, 246 N.E.2d 42.) Failure to incorporate the instructions into the record is especially significant in light of plaintiff's comments during closing argument to the jury, that defendant was "an honest person" and "worthy of belief" and that "a reasonable person (would have) looked prior to proceeding" into traffic; defendant did testify that she looked both ways before proceeding.

The cases cited by plaintiff in support of her position are not applicable. In Maddox v. Grisham, 124 Ill. App. 2d 421, 260 N.E. 2d 336, the defendant was guilty of negligence as a matter of law; here, a fair question of defendant's negligence was raised by the



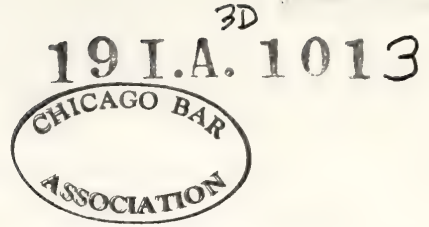
evidence. In Garvey v. Gifford, 3 Ill. App. 3d 375, 279 N.E.2d 386, doubt was created by a deposition taken from one of the witnesses, in light of the "solid evidence" supporting the plaintiff's case. And in Havlovic v. Scilingo, 7 Ill. App. 3d 918, 289 N.E.2d 79, the court on review noted that the trial court properly refused to grant judgment for the plaintiff, in light of the factual questions there presented.

The judgment of the circuit court is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]





59426

A. C. PATTERSON,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
SPINNEY RUN FARMS CORPORATION,	)	HON. JOHN J. KELLEY,
	)	Presiding.
Defendant-Appellee.	)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

A. C. Patterson (plaintiff) brought action for personal injuries in the circuit court of Cook County against Spinney Run Farms Corporation (defendant). After trial, the jury returned a verdict of not guilty. The jury also responded affirmatively to a special interrogatory put to them without objection from plaintiff's attorney: "Immediately prior to and at the time of the occurrence, was the plaintiff guilty of negligence which proximately caused or contributed to cause his injuries?" After judgment on the verdicts, plaintiff appeals.

The evidence offered by plaintiff was that he was driving a truck in a northerly direction at proper speed on a downgrade with wet pavement. His truck was struck in the left rear portion and again on the left front side by another truck driven in the same direction, by defendant's agent. The other driver testified, to the contrary, that plaintiff's vehicle skidded out of control and caused not one but two impacts. Other evidence was that plaintiff's vehicle was damaged on the left side, front and rear portions, but not at the back end. There was also ample material for impeachment of plaintiff because of contradictory statements regarding the cause of the occurrence which he made to three treating physicians. Thus, although the evidence is conflicting, we conclude that the verdicts of the jury, both general and special, are not against the manifest weight of the evidence. An opinion by this court would have no precedential value.



We find that no error of law appears. Since the evidence was such that the jury could have found plaintiff guilty of contributory negligence, it was the mandatory duty of the trial court to present the special interrogatory to the jury. (Ill. Rev. Stat. 1973, ch. 110, par. 65; Green v. Brown, 8 Ill. App. 3d 638, 641, 642, 291 N.E.2d 18.) No objection was made to the form of the interrogatory. However, it is in proper legal form. Hocking v. Rehnquist, 44 Ill. 2d 196, 202, 254 N.E. 2d 515.

The judgment is affirmed in accordance with Rule 23 of the Supreme Court of Illinois, 50 Ill. 2d R. 23.

JUDGMENT AFFIRMED.

EGAN, P.J., and BURKE, J., concur.

(Abstract Only).











# RESERVE BOOK

ILL. APP. CT.

UNPUB'D. OPINIONS

Vol. 19, 3d Series

111573

This reserve book is NOT transferable and must NOT be taken from the library

You are responsible for the return of this book.

DATE	NAME		
10/3/71	<del>James H. Ross</del>	641-2626	
10/3	<del>Randy Sandberg</del>	876 7100	
2/11/76	<del>Tungant</del>	876 8320	
3/30/76	<del>Schmidt</del>	716-0252	
7/14/76	<del>Moerig</del>	726 1235	
7/21/76	<del>Briggs, DO</del>	346 0576	
	<del>Charles Wehr</del>	012 470	
	<del>for Dr. Farnham</del>		
12-9-76	<del>J. Brumby</del>	443-0246	
12-27-76	<del>F. Schwab</del>	782 4115	

ILL. APP. CT.

UNPUB'D. OPINIONS

Vol. 19, 3d Series

111573

